(4)

NO. 87-1602

IN THE
Supreme Court of the United States
October Term, 1988

RONALD D. CASTILLE, District Attorney of Philadelphia County; THOMAS FULCOMER, Superintendent, Huntingdon State Correctional Institute; and LEROY ZIMMERMAN, Attorney General of Pennsylvania,

Petitioners

v.

MICHAEL PEOPLES,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

GAELE McLAUGHLIN BARTHOLD*
Deputy District Attorney
ELIZABETH J. CHAMBERS
Assistant District Attorney
LAURIE MAGID
Assistant District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
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*Counsel of Record

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Petition for Certiorari Filed March 25, 1988
Certiorari Granted May 16, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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DOCKET ENTRIES

Docket Number—4458 Year '86

PEOPLES, MICHAEL—Plaintiff

FULCOMER, THOMAS, SUPERINTENDENT, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY—Defendants

CAUSE Habeas Corpus

(Cite the U.S. Civil Statute under which the case is filed and write a brief Statement of Cause)

Related to CA 85-2031

ATTORNEYS

P.P.

M-4559
Drawer R SCI
Huntingdon, PA 16652

THE DISTRICT ATTORNEY OF PHILA. CO.
By: Donna G. Zucker, Esq.*
Assistant District Attorney
1300 Chestnut Street
10th Floor
Philadelphia, PA 19107
Elizabeth J. Chambers, Esq.

*Deleted in original

DOCKET ENTRIES

*MAG. NAYTHONS****

Date	NR.	Proceedings
1986	(M.K.)	86-4458
1 JULY	28	Relator's Petition for Writ of Habeas Corpus with statement in support of Request Proceed In Forma Pauperis, filed.
2	" 28	ORDER THAT PETITIONER IS GRANTED LEAVE TO PROCEED IN FORMA PAUPERS INCLUDING FILING OF NOTICE OF APPEAL, FILED. 7/28/86 entered & copy mailed.
—	" 28	Referred to Magistrate Naythons.
2 AUG	06	ORDER DATED 8/5/86, NAYTHONS, U.S. MAGISTRATE, THAT THE D.A. OF PHILA. CO IS ADDED AS A PARTY RESPONDENT AND THE CAPTION IS HEREBY SO AMENDED; SPECIFIC AND DETAILED ANSWERS SHALL BE FILED WITHIN 20 DAYS, TOGETHER WITH A MEMO OF LAW, ETC., FILED. 8/6/86: Entered and copies mailed.
—	" 20	State court record received, forwarded to Magistrate Naythons. (Given to George Miller)
3	" 20	DEFT., RONALD D. CASTILLE, D.A. OF PHILA.'S MOTION FOR ENLARGEMENT OF TIME TO FILE RESPONSE, CERT. OF SERVICE, FILED.
4	" 25	ORDER DATED 8/25/86, NAYTHONS, U.S. MAGISTRATE, THAT RESPONDENTS' TIME FOR FILING A RESPONSE IS EXTENDED TO 9/17/86, FILED. 8/25/86: Entered and copies mailed.

5 SEPT	08	ORDER DATED 9/6/86, KATZ, J., THAT RESPONDENT'S TIME FOR FILING A RESPONSE IS EXTENDED TO SEPTEMBER 17, 1986, FILED.
6	" 17	RESPONDENT, RONALD D. CASTILLE, D.A. OF PHILA. CO.'S MOTION FOR ENLARGEMENT OF TIME TO FILE RESPONSE, CERT. OF SERVICE, FILED.
7	" 17	Pretrial telephone conf., 9/15/86, Green, J., filed.
(6)	" 19	ORDER THAT RESPONDENT'S TIME FOR FILING A RESPONSE IS EXTENDED TO 9/26/86, FILED. 9/19/86: Entered and copies mailed.
8	" 30	Ronald D. Castille, D.A. of Phila.'s response to petition for Writ of Habeas Corpus, cert. of service, filed.
9 OCT	16	PLFF'S MOTION FOR IN FORMA PAUPERIS COPIES OF STATE TRIAL TRANSCRIPTS, CERT. OF SERVICE FILED.
10	" 20	Petitioner's traverse to respondent's answer, cert. of service, filed.
1987		
11 MAR	09	Withdrawal of D.G. Zucker, Esq., for Thomas Fulcomer, filed.
—	" 09	Appearance of Elizabeth J. Chambers, Esq., for Thomas Fulcomer, filed.
12 APR	03	Report and Recommendation of U.S. Magistrate Edwin E. Naythons that the petition for writ of habeas corpus be denied & dismissed without prejudice for failure to exhaust state remedies. It is further recommended that petitioner's motion for this Court to provide him with a complete copy of the state court

trial transcripts in *Commonwealth v. Peoples* be denied. There is no probable cause for appeal, filed.

4/3/87: Entered and copies mailed.

(12) " 17 ORDER THAT THE REPORT AND RECOMMENDATION OF U.S. MAGISTRATE EDWIN E. NAYTHONS IS APPROVED AND ADOPTED. THE PETITION FOR WRIT OF HABEAS CORPUS IS DENIED & DISMISSED WITHOUT PREJUDICE FOR FAILURE TO EXHAUST STATE REMEDIES; PETITIONER'S MOTION FOR STATE COURT TRIAL TRANSCRIPTS IS DENIED (THE PETITIONER MAY RENEW THIS REQUEST IF HE FILES P.C.H.A. PROCEEDINGS BEFORE THE STATE COURT); THERE IS NO PROBABLE CAUSE FOR APPEAL, FILED.

4/17/87: Entered and copies mailed.

13 " 20 Petitioner's Objections to Magistrate Report/ Recommendation, Cert. of Serv., filed.

14 " 22 ORDER THAT THE PETITION FOR WRIT OF HABEAS CORPUS IS DENIED & DISMISSED WITHOUT PREJUDICE FOR FAILURE TO EXHAUST STATE COURT REMEDIES. PETITIONER'S OBJECTIONS TO MAGISTRATE NAYTHONS' REPORT & RECOMMENDATION ARE ALSO DENIED. IT IS FURTHER ORDERED THAT PETITIONER'S MOTION FOR THIS COURT TO PROVIDE HIM WITH A COMPLETE COPY OF THE STATE COURT TRIAL TRANSCRIPTS IN *COMMONWEALTH V. PEOPLES* IS DENIED. THERE IS NO PROBABLE CAUSE FOR APPEAL, FILED.

4/22/87: Entered and copies mailed.

1987

15 APR 28 Plff's Notice of Appeal, filed. (87-1247)
4/29/87: Copies to: E.J. Chambers, Esq., D. Spitz, U.S.C.A., Honorable Marvin Katz

16 " 28 Copy of Clerk's Notice to U.S.C.A., filed.

— " 30 ORIGINAL RECORD TRANSMITTED TO U.S.C.A. (Pleadings #1, 5, 7 & 14 not included)

17 JUN 04 Certified copy of order from U.S.C.A. that Certificate of Probable Cause is granted, filed.

18 " 22 Copy of Appellant's Transcript Purchase Order, filed.

— " 29 Record on appeal return.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 87-1247

ORIGIN: Eastern DC DOCKET NO. Civil 86-4458 DC JUDGE Marvin Katz FILED IN DC 7-28-86 NOA FILED 4-28-87 CASE TYPE CV-Habeas Corpus DOCETED: 4-30-87 CJA ☐ Fee Paid [X] IFP [X] CJA* ☐ USA [X] CPC Granted in USCA 6/3/87 DISCLOSURE Applt./Pet. 6-22-87 STATEMENT Appee./Resp. N/A

TITLE OF CASE

PEOPLES, MICHAEL,

Appellant

vs.

FULCOMER, THOMAS, SUPERINTENDENT, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

APPEARANCES

APPELLANT:

Robert E. Welsh, Jr., Esquire—6-22-87
Montgomery, McCracken, Walker & Rhoads
Three Parkway, 20th Floor
Philadelphia, PA 19102 563-0650
[Ct. Aptd.—Civil]—6/16/87

APPELLEE/RESPONDENT:

change of address—per 2/16/88 letter
Elizabeth J. Chambers, Esq.—5-5-87
Office of District Attorney
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5th Floor
Phila., PA 19102
215-686-5744
[Appellee, Ronald D. Castille, District Attorney]

*Deleted in original

NO. 87-1247

RECORD, EXHIBITS & BRIEF INFORMATION/Filing: 6-26-87 Partial Rec. or Cert. List

Record on Appeal ☐ IMPOUNDED

Covers #
6-22 N.T. Needed Transcript ordered None
Transcript filed in DC: ——.

1st Supp. Record
2nd Supp. Record
Exhibits ☐ REC. RM. ☐ SAFE
Administrative Transcript
6-26-87 Briefing Notice Issued C-6126 Covers #——
9-4-87 Brief for Applt. HD 9-4-87 10cc
10-5-87 Brief for Appee. M.S. 10-5-87 (10cc)
10-22-87 Reply B. for Applt. HD 10-22-87 10cc

• • •

RECORD & BRIEF INFORMATION (Cont.):

Brief of Amicus .....

Brief for Intervenor .....

Appendix 9-4-87 M.S. 3cc

Appee. Appendix .....

Supp. Appendix .....

SUMMARY OF EVENTS
DISMISSALS: Rule 28 [ ]
ARGUED 12/7/87
PANEL Greenberg, Scirica & Hunter, CJ
REARGUED—
JUDGMENT-ORDER ——

OPINION 12/30/87 ☐ Mem. Op. ☐ Signed [X] P.C.
N/P or Pub.
MO —— CO —— DO ——

JUDGMENT 12/30/87. Reversed and Remanded. Costs taxed against appellees.

PET. FOR REHG. 1-13-88 by Aplee, w/serv.(bj)

[X] Denied ☐ Granted [X] In Banc ☐ Panel
1-25-88

Mandate FURTHER stayed to: 4-15-88
Rule 42(b) ——

MANDATE FURTHER STAYED TO: 3-16-88

MANDATE STAYED TO: 2-15-88
MANDATE ISSUED ——
RECORD RETURNED ——
BILL OF COSTS ——

CERTIORARI FILED 3-25-88

☐ Denied [X] Granted 5-16-88 S.C. #87-1602
Reported at ——— F2d ——

DATE	FILINGS—PROCEEDINGS
1987	
May 5	Staff Atty. letter to aplt advising case will be submitted to a panel of this Court for a decision on the issuance of a certificate of probable cause; responses due within 15 days of the date of this letter. (sdt)
June 3	Order (*Seitz,* Higginbotham & Sloviter, C.J.) granting request for a certificate of probable cause, filed. (sdt) CC to C of DC
June 9	Letter—Motion dated 6/8/87 from Edward H. Weis, Esq, to be relieved as crt-apptd cnsel for applt, filed. (dt)
June 9	Letter—Response dated 6/9/87 from Elizabeth J. Chambers, Esq, cnsl for applees, to Mr. Weis' let—mot to be relieved as crt-apptd cnsel for applt, filed. (dt)
June 16	Order (Clerk) granting Def. Assn.'s req. to be relieved of apptmt. to represent aplt; the D.A.'s response is noted, filed. (sdt)

July 30	Motion by aplt. for X of time to file B, filed. (gt)
July 31	Order (Clerk) granting above motion. Aplt. to file & servr B on/before 9-4-87. Cnsel. to notify this office in writing if state court record has not been located by 8-10-87, filed. (gt)
Oct 14	Clerk's letter written at direction of Court requesting a letter (O+3) explaining how this case is affected by this Court's recent decision in *Chaussard v. Fulcomer,* 816 F.2d 925 (3d Cir. 1987). Counsel to respond within 10 days from date of letter. (as)
Oct 23	Letter dd. 10-23-87 from Elizabeth J. Chambers, Esq., cnsel for appee, rec'd at the direction of the Ct., filed. (sdt)
Oct. 26	Letter dd. 10-26-87 from Robert E. Welsh, Jr., Esq., cnsel for aplt, rec'd at the direction of the Ct., filed. (sdt)
1988	
Feb. 2	Motion to Stay Mandate by the applee., to and including February 15, 1988 (23 days) w/serv., fld. (bj)
Feb. 5	Order (HUNTER, C.J.) granting above motion, to & incl. 2-15-88, fld. (bj)
Feb 11	Motion to extend stay of Mandate by aplee, to & incl. Mar. 16, 1988, w/serv. fld., (bj)
Feb 18	Order (HUNTER, C.J.) granting above motion to & incl. 3-16-88, fld. (bj)
Mar 14	Motion to further extend stay to mandate to and including April 15, 1988, by the appellees, w/serv., fld. (bj)

Mar 18 Response in Opposition to Motion to Further extend the Stay of the issuance of the mandate, by the appellant, w/serv. fld., (bj)

Mar 23 Order (HUNTER, C.J.) granting motion to further stay mandate, to and incl. April 15, 1988, fld. (bj)

May 18 Cert. Copy of Order from Clk of Sup. Ct. allowing Certiorari on 5-16-88, fld.

DEFENDER ASSOCIATION OF PHILADELPHIA

BY: Benjamin Lerner, Defender, and
Harvey S. Booker, Jr., Assistant Defender

Identification No. 00001
121 North Broad Street
Philadelphia, Pa. 19107
(215) 568-3190

Attorney for Michael Peoples

	) Court of Common
	) Pleas
	) Criminal Trial
	) Division
	) November
COMMONWEALTH OF	) Sessions, 1980
PENNSYLVANIA	) Nos. 487 (ct. 1),
	) 490 (ct. 2),
VS	) 491
	) Charges: Arson,
MICHAEL PEOPLES	) Endangering Per-
	) sons, Agg. Assault,
	) Robbery
	) 1/12-16/81
	) Trial Date:
	) Trial Room: 653
	) Trial Judge:
	) Honorable James
	) T. McDermott

POST VERDICT MOTIONS

TO THE HONORABLE,
THE JUDGES OF THE SAID COURT:

The above named defendant by his attorneys, Harvey S. Booker, Jr., Assistant Defender, Louis M. Natali, Jr., First Assistant Defender, and Benjamin Lerner, Defender, respectfully moves for post verdict relief for the following reasons:

1. Prosecutorial, prejudicial remarks in the assistant district attorney's opening remarks and summation to the jury. The remarks were to homicide cases.

2. The motion to suppress the identification of Mr. James Wright, a commonwealth witness, should have been granted. This witness stated he was called by police and GIVEN A DESCRIPTION OF DEFENDANT. Said hearing was before the Honorable James T. McDermott on January 7, 1981 in Room 653, City Hall.

3. The physical lineup as to this defendant of October 3, 1980 was cancelled because of an alleged material change in his physical appearance. However, he was not advised as to why the lineup was cancelled nor of the possibility of having a subsequent lineup.

4. The Court abused its discretion in permitting evidence of two prior robbery convictions to be used against the defendant to attack his credibility.

5. The Court denied the defendant's requested right to the waiver of a jury trial.

6. The Court permitted the assistant district attorney to use the uncertified notes of testimony of the motion to suppress hearing to attack the credibility of the defendant. The defense did not have access to these notes prior to the time of trial nor did the defense know they were in existence until used as stated above.

7. The Court gave an accomplice charge over the objection of the defense even though the defendant was not charged with criminal conspiracy nor was there any accomplice testimony.

At this writing the defense does not have the benefit of the trial notes of testimony. Therefore we respectfully

request permission to amplify the foregoing and to submit such additional reasons in support of the post verdict motions as should appear in said notes in our request for either a new trial or an arrest of judgment.

Respectfully submitted,

/s/ Harvey S. Booker, Jr.
HARVEY S. BOOKER,
Assistant Defender
LOUIS M. NATALI, JR., FIRST ASSISTANT
Defender, and with them,
BENJAMIN LERNER,
DEFENDER
Attorney for the Defendant
Defender Association of
Philadelphia

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION

	) November Sessions,
	) 1980
COMMONWEALTH	) No. 487—Arson
	) Endangering
vs.	) Person/
	) Property
MICHAEL C. PEOPLES	) 490—Simple
	) Assault - Agg.
	) Assault
	) 491—Robbery

OPINION

CHARLES P. MIRARCHI, JR., A.J.—June 8, 1982

MICHAEL C. PEOPLES, defendant was tried and convicted of Arson Endangering Persons, Aggravated Assault and Robbery, by the HONORABLE JAMES T. MC DERMOTT, sitting with a jury on January 16, 1981. Sentencing was deferred pending the filing of post-trial motions and the conduct of a pre-sentence investigation and a psychiatric evaluation. Post-trial motions were timely filed on January 26, 1981. Subsequently on April 28, 1981, these motions were heard and denied. Thereupon the defendant was sentenced on Bill No. 487, November Term, 1980 to be committed to the State Correctional Institution at Graterford for a period not less than (10) ten years nor more than (20) twenty years. On Bill No. 490, November Term, 1980, the defendant was sentenced to a (10) year period of probation to run concurrently with the sentence imposed on Bill No. 487. On Bill No. 491, November Term, 1980, the sentence was to a period of incarceration of not less than (5) five years nor more than (20)

twenty years to run consecutively to the sentence imposed on Bill No. 487. On May 22, 1981, the defendant appealed the judgment of sentence imposed by this Court to the Superior Court of Pennsylvania. Judge McDermitt was recently elected to the Supreme Court of Pennsylvania and this appeal was assigned to this Court, as Administrative Judge of the Trial Division, for an Opinion.

The evidence at trial established that during the evening hours of August 1, 1980, and the early morning hours of August 2, 1980, the victim, THOMAS GALLAGHER, frequented a neighborhood bar in the Kennsington Section of the City and subsequently went down to Society Hill Section, in the area of 2nd and South Streets, to another bar. Sometime after midnight, the victim walked up Chestnut Street to (15th) fifteenth Street, where he noticed (3) three black males dragging another white man. The victim, being intoxicated did not remember the sequential order of events, however, the evidence established that the victim was brought into the Touraine Apartments located at 1520 Spruce Street, by defendant and a few other men. He was led into the elevator by these men. Shortly thereafter, the victim was found on the (7th) seventh floor of the Touraine Apartments on fire and unconscious. A few minutes later, the defendant was seen hurriedly leaving the apartment building. The defendant was found approximately (3) three hours after the incident in a restaurant near the apartment house with the victim's wallet in his possession. Based on this evidence, the jury found this defendant guilty of Arson Endangering Persons, Aggravated Assault and Robbery.

The defendant was found guilty of Arson Endangering Persons. A person commits a felony of the first degree if

he intentionally starts a fire, or causes an explosion, whether on his property or on that of another, and thereby recklessly places another person in danger of death or bodily injury. 18 Pa. C.S.A. § 3301 (a).

A conviction of Arson demands the establishment of three (3) facts:

1. that there was a fire;
2. that it was of incendiary in nature, and
3. that the defendant was the guilty party, *COMMONWEALTH v. COLON,* 264 Pa. Super. 314, 399 A2d 1068 (1979).

The evidence established that the victim was found burned and unconscious. He was found lying face down with his shirt smoldering on the (7th) seventh floor of the Touraine Apartments. The facts revealed that there were no open flames, exposed wires, or any part of the hallway or building on fire, except for the victim's shirt. Consequently, the testimony established there were no possible sources for an accidental fire. The facts also proved that the victim suffered 2nd and 3rd degree burns over his lower back and hands. The burns were so serious that a skin graft had to be performed while the victim was hospialized.

This defendant was seen entering the apartment building with the victim and also seen leaving hurriedly out of the building only moments before the victim was found. A few hours later defendant was found possessing the victim's wallet. Although there was no direct evidence that this defendant started the fire on the victim, this has never

been a prerequisite to a conviction of Arson. *COMMONWEALTH v. LESLIE,* 424 Pa. 331, 227 A2d 900 (1967).

It is well settled that the test for evaluating the sufficiency of the evidence to support a conviction is whether, viewing the evidence in light most favorable to the Commonwealth, and drawing all reasonable inference therefrom, the trier of fact could have found that all of the elements of the offense had been established beyond a reasonable doubt. *COMMONWEALTH v. SERO,* 478 Pa. 440, 387 A2d 63 (1978). In light of all the evidence presented during defendant's trial, the elements of this offense were clearly established beyond a reasonable doubt. *COMMONWEALTH v. COLON,* supra.

The defendant was also convicted of Robbery. A person commits a Robbery if, in the course of committing a theft, he inflicts serious bodily injury upon another. 18 Pa. C.S.A. § 3701 (a) (1) (i). In the instant case, the evidence established that the defendant was seen entering the apartment with the victim. Moments later the defendant was seen quickly exiting the building minutes before the victim was found burned and unconscious. The victim testified that his wallet had been taken during the incident. Approximately (3) three hours after the incident, the defendant was found possessing the victim's wallet. Evidence of possession of stolen property is not sufficient alone to prove theft, but it may combine with other circumstances surrounding the theft and form sufficient evidence to warrant inference of guilty knowledge. *COMMONWEALTH v. VERMILLE,* 275 Pa. Super 263, 418 A2d 713 (1980). Consequently, the elements of this offense were established beyond a reasonable doubt. *COMMONWEALTH v. TALLON,* 478 Pa. 468, 387 A2d 77 (1978).

The defendant was also convicted of Aggravated Assault. Aggravated Assault is committed if a person attempts to cause serious injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa. C.S.A. § 2702 (a) (1).

The evidence proved that the victim suffered damage to his bladder and pancreas from being kicked repeatedly. He was found burned and unconscious and taken immediately to a nearby hospital. The victim spent a total of (21) twenty-one days in the hospital, (9) nine of which were in the intensive care unit. The victim also received 2nd and 3rd degree burns to his back and hands. This evidence clearly established this offense beyond a reasonable doubt. *COMMONWEALTH v. FRANK*, 263 Pa. Super 452, 398 A2d 663 (1979). *COMMONWEALTH v. DESSUS*, 262 Pa. Super 443, 396 A2d 1254 (1978).

The defendant raised a number of issues in his post-trial motions, each of which will be discussed below:

First, the defendant contends that the district attorney committed prosecutorial misconduct in his opening and closing remarks. Specifically both in his opening and closing, the district attorney stated that this case was similar to a homicide case, in that the victim could offer little testimony. (N.T. 1/13/81 p. 112; 1/16/81 p. 376).

The facts established by the notes of record, indicate that the victim was found on fire and in an unconscious state. (N.T. 1/13/81 p. 170). The victim remembered little of the events which led to this incident. It has been held that allegedly prejudicial remarks must be read in the

context of the case as a whole and with a particular view to the evidence presented. *COMMONWEALTH v. BOONE*, 286 Pa. Super. 384, 428 A2d 1382 (1981), *COMMONWEALTH v. BULLOCK*, 284 Pa. Super. 601, 426 A2d 657 (1981).

The Supreme Court of Pennsylvania has held that a district attorney must have reasonable latitude in fairly presenting his case to the jury and must be free to present his arguments with logical force and vigor. *COMMONWEALTH v. SMITH*. 490 Pa. 380, 416 A2d 986 (1980).

This Court finds that these comments, taken in their entirety did not enrage the passions of the jury as to prejudice them against the defendant and properly overruled the objection.

The defendant next argues that the Court erred when it denied defendant's motion to suppress the identification of the defendant by Mr. Hassano, a security guard, and Mr. Wright, the desk attendant, at the Touraine Apartments, for the reason that said indentifications (sic) were tainted because of a photo array and because the police allegedly gave a description of the defendant to Mr. Wright over the telephone.

Judge McDermott, based on the evidence presented, found that the photo array was not suggestive, even though Judge McDermott did agree that the photo array contained only one photo of a man with a bush hair style. That defendant had an unusual bush which made him distinctive. Furthermore, notwithstanding the photo array, the court concluded that given the uniqueness of the defendant's hair, the scar across his nose, the opportunity

for the witnesses to view the defendant at a distance of approximately three feet, to speak to him and to observe him for at least three minutes, the witnesses had an independent basis for the identification and those witnesses identified the defendant from their own opportunity to observe him at the scene and at the time of this incident.

This Court has reviewed the testimony presented at the Motion to Suppress, and Judge McDermott's findings are clearly supported by the record, specifically:

Mr. Wright testified that he watched defendant enter the building with other men and walk past him towards the elevator. A few minutes later, the defendant and another man came off the elevator and walked quickly to the exit doors. However, defendant walked to the wrong doors and Mr. Wright told defendant he had to use the other doors.

It has been held where witnesses had sufficient basis for identifying defendant independant (sic) from any suggestive police confrontation, alleged undue suggestiveness was not a basis of suppressing the in-court identification of witnesses. *COMMONWEALTH v. JOHNSON,* (Pa. Super. 1981), 436 A2d 645 (1981). *COMMONWEALTH v. SLAUGHTER,* 482 Pa. 538, 394 A2d 453 (1978). *UNITED STATES v. HIGGINS,* 458 F2d 461 (3rd Cir. 1972). Therefore, allowing James Wright to testify at trial that the defendant *MICHAEL PEOPLES* was the person he saw that night at the Touraine Apartments, was not error.

The defendant next contends that he was denied the right to a physical line-up. However, there are no Pennsylvania cases which grant a defendant the right to a line-

up. *COMMONWEALTH v. WALKER,* 275 Pa. Super 311, 418 A2d 737, 741 (1980). In addition, defendant cannot now complain that a 2nd physical line-up should have been granted since it was the actions of defendant himself which caused the first line-up to be cancelled. The facts prove that a physical line-up was scheduled for Mr. Peoples on October 23, 1980, in which there was an order that defendant was not to change his appearance. At the time he was arrested he had an extremely large Afro hair style. However, when defendant appeared for the line-up, his hair was plastered to his head, resulting in a direct violation of the order issued by Judge Collins on October 3, 1980. Therefore this Court finds no error in denying defendant's request for a line-up.

The defendant in his (4th) fourth contention alleges the court abused its discretion in permitting evidence of prior robbery convictions to be used against defendant to attack his credibility.

Prior to the defense putting on their case, a *BINGHUM* hearing was conducted. A pre-sentence report revealed that defendant had two prior robbery convictions occurring in 1973 and 1974. Defendant had served a (2½) two and one-half year term, culminated with (5) five years probation. In 1978 he was convicted of retail theft. These prior convictions, two for robbery and one for theft were crimen falsi and therefore highly pertinent to veracity and credibility. The defendant is (32) thirty-two years of age and his criminal record dates back to 1970, including (22) twenty-two arrests, (11) eleven convictions including (3) three for robbery and other various criminal offenses. (N.T. 4/28/81 p. 35).

The Supreme Court of Pennsylvania in *COMMONWEALTH v. ROOTS,* 482 Pa. 33, 393 A2d 364 (1978) outlined five basic considerations the trial court must balance in determining whether evidence of prior crimes should be admitted for the limited purpose of impeaching defendant's credibility. See also *COMMONWEALTH v. HENDERSON;* (Pa. 1981) 438 A2d 951 (1981).

In applying the fourth factor enumerated in *ROOTS,* supra, to the present case, the evidence presented during trial was in great part circumstantial, although a very important piece of physical evidence, namely the victim's wallet was found on the defendant shortly after the incident. The victim was unable to testify as to who his assailants actually were and the two witnesses identifying Mr. Peoples testified only to Mr. Peoples entering the apartment building with the victim and exiting the apartment building a few minutes prior to the time the victim was found burned and robbed. There was no direct testimony describing the events which occurred between the time the defendant entered and exited the apartment building except for the testimony of the defendant himself. Consequently, the only available means of attacking defendant's credibility was by the use of his prior convictions.

For these reasons, the trial court's ruling allowing impeachment was a sound exercise of discretion since the standards set forth in *COMMONWEALTH v. ROOTS,* supra were met.

Defendant next argues that the Court improperly denied his right to waive a jury trial. This contention is meritless. On January 7, 1981, a suppression hearing was

held with the Honorable James T. McDermott presiding. As a result of that hearing Judge McDermott was obliged to rule upon the credibilities involved in that hearing. Subsequently, those motions were denied.

On January 12, 1981, this case was set for trial again with Judge McDermott presiding. At that time defendant requested a waiver of a jury trial.

The Court believed that the interest of justice required the defendant to have a jury trial and thereby denied defendant's request. This reasoning was based upon the fact that this Court previously heard testimony by the defendant while conducting the suppression hearing and ruled accordingly.

Rule 1101 of the Pennsylvania Rules of Criminal Procedure expressly provide the trial judge with discretion in accepting a criminal defendant's waiver of a jury trial. However, there is no constitutional right to waive a jury trial. As stated in *COMMONWEALTH v. GARRISON,* 242 Pa. Super. 509, 364 A2d 388 (1976), "it is well established there is no constitutional prohibition to court's denial of defendant's request to be tried by a judge sitting without a jury." In addition, the Pennsylvania Supreme Court has sharply criticized the practice of holding a non-jury trial before the same judge who presided at a pre-trial suppression hearing. *COMMONWEALTH v. BAXTER,* 282 Pa. Super. 467, 422 A2d 1388 (1980), *COMMONWEALTH v. PAQUETTE,* 451 Pa. 250, 301 A2d 837, (1973).

This defendant was tried before a jury and was not prejudiced by the fact that Judge McDermott also presided over his suppression hearing. See *COMMONWEALTH v.*

JOHNSON, (*Pa. Super.* 1981), 436 A2d 645 (1981). Therefore, this Court properly exercised its discretion and denied defendant's request to waive a jury trial.

The defendant's sixth issue, again is meritless. The use of the notes by the district attorney did not prejudice the defendant in any way. The questions asked the defendant were just a reiteration of what was asked him during the suppression hearing. The defense counsel was given the opportunity to read along with the district attorney.

Secondly, the defendant's credibility was not attacked. The defendant said the same thing from the witness stand as he said in the suppression hearing. He wasn't impeached, therefore he did not need to be rehabilitated. There was no prejudice to this defendant and therefore the use of the notes were not error.

The defendant lastly asserts that the accomplice charge was improper, since the defendant was not charged with criminal conspiracy and there was no accomplice testimony.

The facts established at trial that the defendant was with a group of males who entered the Touraine Apartments. Defendant testified that he entered the building with the victim and a few other men. The witnesses identified the defendant as one of the two men leaving the apartment building shortly before the victim was found burned and unconscious. The prosecution's case was based on both circumstantial and direct evidence. There was no direct testimony that this defendant actually committed the arson and robbery, however, the jury could infer that

this defendant had participated in the offense since the defendant was found in possession of the victim's wallet.

It is well established that an accomplice may be convicted on proof of the commission of the offense and his complicity therein, even though the person claimed to have committed the offense has not been prosecuted or convicted . . . 18 Pa. C.S.A. § 306.

Considering all the testimony of the witnesses and evidence presented, the trial judge was required to instruct the jury on this issue. It is clearly the law of the Commonwealth that the charge of the trial court to the jury must be adjudged in its entirety and not by isolated passages or portions. *COMMONWEALTH v. PORTER,* 449 Pa. 153, 295 A2d 153 (1972), *COMMONWEALTH v. KELLY,* 245 Pa. Super. 351, 369 A2d 438 (1977).

This Court has reviewed the notes of testimony of the court's instruction to the jury and find that the Court's instructions were supported by the testimony presented. Therefore the Court's charge to the jury was proper and complete.

In summary, this Court has carefully reviewed the entire record of this case and finds no harmful, prejudicial or reversible error and nothing to justify the granting of defendant's motions.

BY THE COURT:

/s/ Charles P. Mirarchi, Jr.,
Charles P. Mirarchi, Jr., A.J.

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PHILADELPHIA

COMMONWEALTH OF PENNSYLVANIA

VS NO. 1335 Philadelphia, 1981

MICHAEL PEOPLES

BRIEF FOR APPELLANT

Appeal from Judgment of Sentence, April 28, 1981, November Term, 1980, Numbers 0487, 0490, and 0491, Court of Common Pleas, Trial Division, Criminal Section, Philadelphia.

VINCENT T. SNYDER, ESQUIRE
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STATEMENT OF QUESTIONS PRESENTED

1. Did the Suppression Court err in failing to grant the defendant's motion to suppress out-of-court and in-court identification because the procedure used was suggestive

and there was not an independent basis for the in-court identification?

Answered in the negative by the court below.

2. Was it prejudicial error for the Municipal Court Judge to deny the defendant's request for a lineup?

Answered in the negative by the court below.

3. Did the trial court err in denying the defendant's *Bighum* Motion and ruling that two of the defendant's prior convictions would be admissible to impeach his testimony?

Answered in the negative by the court below.

4. Did the trial court err in charging the jury on the liability of the defendant for the acts of an accomplice?

Answered in the negative by the court below.

5. Was the sentence imposed on the defendant on the present bills illegal?

Not answered or raised in the court below.

6. Did the defendant receive effective assistance of trial counsel?

Not raised and/or answered in the court below.

SUMMARY OF ARGUMENT

1. The Suppression Court found that the photo display shown to the two witnesses, Mr. Wright and Mr. Hassano, was defective but found that there was a prior independent basis; however, this finding is not supported by the evidence presented at the hearing.

2. The defendant's request for a lineup was originally granted but subsequently revoked. The revokation was not based on valid reasons and this denial resulted in the denial to the defendant of a fair and unprejudiced identification procedure.

3. The trial court erred in finding that the Commonwealth could introduce into evidence the defendant's prior convictions for robbery and retail theft to impeach his credibility. It is clear from the record that the Commonwealth had other means by which to attack the defendant's credibility and the defendant had no other means of presenting his version of the incident.

4. The court erred when it charged the jury on the liability for the conduct of another or by giving a so-called accomplice charge since there was no evidence that more than one person did any of the alleged acts charged.

5. The defendant was found guilty of arson endangering another person, aggravated assault and robbery. He was given a separate sentence on each one of these charges. Since all of these charges stem from a single incident, the sentence on the arson and aggravated assault charges should have merged with the sentence imposed on the robbery charge.

6. The defendant did not receive effective representation by trial counsel. Trial counsel failed to adequately prepare the defendant's case, removed himself from a lineup causing a subsequent defective identification procedure to be used, did not request necessary points for charge and did not preserve substantial meritorious claims for appellate review.

ARGUMENT

I. MOTION TO SUPPRESS IDENTIFICATION

The defendant was arrested on August 2, 1980. Prior to his initial preliminary hearing he moved for a lineup since no prior identification had been made of him by the victim or either of the other civilian witnesses. This request was granted by the Municipal Court Judge, the Honorable John Gardner Colins, who wrote on the short certificate that the defendant was not to change his appearance in any way, prior to the lineup which was scheduled to be held in the Philadelphia Prison's Dentention Center on the evening of October 22, 1980. The defendant was incarcerated at the time of these events and there was no evidence that this order was ever communicated to him. It should be noted at this point that at the time of his arrest which occurred within hours of the alleged incident the defendant's hair was styled in an "Afro" or "bush" which extended approximately a foot to 13" from his head.

On the night of the defendant's lineup, the defendant, who was incarcerated at the time, appeared with his hair "greased" down; however, the hair had not been cut. (N.T. 10/24/80 pp 4-5.)

When the defendant's case was called for the preliminary hearing, his counsel requested a continuance and the scheduling of another lineup. Judge Alan K. Silberstein, in denying the continuance stated, "One of the reasons I am making this order, I am making it clear on the record, is that the public defender walked out of the lineup the night it was scheduled." (N.T. 11/24/80 p 22.)

At the time that these discussions regarding the fact that the defendant had a large bush or Afro hair style were discussed by Judge Silberstein and counsel, both of the identification witnesses were present in the courtroom.

Although the defendant's counsel requested an opportunity, on October 24, 1980, to present evidence concerning the events at the scheduled lineup, this request was denied and the court permitted a photographic array to be shown to both of the eyewitnesses.

It should be noted that on the morning of the defendant's arrest, the police described the physical characteristics of the person they arrested to Mr. Wright, one of the identification witnesses. (N.T. 1/7/81.) Moreover, while being taken to the aborted lineup on October 22, 1980, Mr. Wright was told by the police that the defendant, the man who had been arrested in this incident, would be in the lineup. (N.T. 1/7/81, p.70.) Two days later Mr. Wright and Mr. Hassano were shown a photo display of eight pictures. Only one photo, that of the defendant, was of an individual with a tall Afro. (N.T. 1/7/81, p. 73.) The Suppression Court found this display "defective." (N.T. 1/12/81, p. 177.) but did not explain fully the basis of this ruling. The Suppression Court also found an independent basis for the in-court identification. (N.T. 1/12/81, p. 178.)

The relevant identification testimony came from Mr. Wright, the evening desk clerk at the Touraine Apartments, 1520 Spruce Street, Philadelphia, Pennsylvania, and James Hassano, a security guard, who at the time of this incident was specially employed by a tenant of the Touraine Apartments.

Mr. Hassano testified that on August 2, 1980, at about 2:30 a.m., be (sic) observed four individuals enter the Tourane (sic) Apartments. The four men crossed the lobby and entered an elevator. During this sequence of events, Mr. Hassano stated that he observed these individuals for approximately ten seconds while they waited at the door prior to entering and one and a half minutes as they crossed the lobby and entered the elevator. These four individuals passed Mr. Hassano at a distance of at least eight feet at their closest. (N.T. 1/7/81, pp 6-9). At approximately 2:45 a.m., Mr. Hassano saw two of these four individuals exiting the building. He saw them at distances of from forty feet to five feet away for a period of approximately forty-five seconds. (N.T. 1/7/81, pp 10-11). He stated that the defendant was one of the men whom he saw enter the building and one whom he saw leave. He described the defendant as to his hair style and as to a scar on his nose; however, he misdescribed the scar. (N.T. 1/7/81, pp 40.)

Mr. Wright testified that he was on duty on the night in question and saw a "bunch" of individuals enter the building but did not notice if the defendant was part of the group. (N.T. 1/7/81, p 61.) He claims that he first saw the defendant when he left the biulding but this section of the incident took only a "matter of seconds." (N.T. 1/7/81, p. 63.)

Appellate counsel does not clearly understand what the Suppression Court menat (sic) when it ruled that the photo array was "defective." In fact, the Honorable Charles P. Mirarchi, Jr., who wrote the opinion of the lower court, although he was not the judge who presided over the motion to suppress and the trial, stated that

"Judge McDermott . . . found that the photo array was not suggestive . . ." (Lower Court Opinion, p.8.) Whether the lower court did or did not find that the photo array was suggestive, the record does make it clear that the defendant was not identified as the result of a fair and impartial identification procedure.

While it is true that there is no Pennsylvania case which grants a defendant the right to a lineup, *Commonwealth v. Walker,* Pa. Superior 418 A.2d 737 (1980); where identification is at issue, a timely request for a pretrial or pre-hearing identification procedure should be granted. *Commonwealth v. Sexton,* 485 Pa. 17, 400 A.2d 1289 (1979). In the present case, there was no justifiable reason for denying the defendant's request for a new lineup. The Municipal Court Judge who denied the second lineup did so because of the actions of defendant's attorney in removing himself from the procedure. There was no evidence at all that the order regarding changing his appearance was conveyed to the defendant. Moreover, the testimony was that the defendant had "greased" or "plastered down" his hair. He had not cut it. There was no showing that this alteration was in any way permanent or that it could not be quickly remedied.

In addition to the denial of the lineup, it is clear that the photographic array was suggestive. Both eyewitnesses were present, in the courtroom, while counsel openly and at length discussed the extreme length of the defendant's hair. In addition, shortly after the defendant's arrest, the police called Mr. Wright and the police described to Mr. Wright the man whom they had arrested. Also, when he was being taken to the aborted lineup. Mr. Wright was

told that the man they had arrested would be in that lineup. Two days later, both Mr. Wright and Mr. Hassano, were shown eight photographs and of that eight only one photo, the defendant's, was of a person with a tall Afro. It is beyond reason to believe that any finder of fact could find that such a procedure was in its totality anything but suggestive.

However, suggestively (sic) alone was not the issue. The Suppression Court after finding the photo array "defective," went on and decided that there was an independent basis for the identification.

To determine whether an in-court identification is independent and therefore reliable, the following factors must be considered:

> (1) the manner in which the pretrial identification was conducted; (2) the witness' prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancise (sic) between the defendant's actual description and any description given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and the out-of-court identification. *Commonwealth v. Levelle,* Pa. Super Ct. 419 A.2d 1269 (1980); *Commonwealth v. Slaughter,* 482 Pa. 538, 546, 394 A.2d 453, 457 (1978) citing *U.S. v. Higgins,* 458 F.2d 461, 465 (3rd Cir. 1972); *Commonwealth v. Cox,* 466 Pa. 582, 588-89, 353 A.2d 844, 847 (1976) (substantially same criteria).

In the present case: (b) (sic) the manner in which the pretrial identification was conducted; (2) the witness' prior opportunity to observe was extremely brief (Mr.

Wright for a matter of seconds and Mr. Hassano for a total of two minutes and twenty-five seconds; (3) there was a discrepancy between the way Mr. Hassano described the defendant's scar on the nose and the actual scar and no testimony as to Mr. Wright ever giving a prior description; (4) there was no previous identification by either witness of any of the other alleged participants; (5) the other previous identifications of the defendant were in highly suggestive circumstances and a period of over five months between the incident and the identification at trial.

From applying the factors mandated by the cases cited, it follows that the in-court identification of the defendant by Mr. Wright and Mr. Hassano should have been suppressed because of the lack or (sic) an independent basis. Accordingly, said identification should be ordered suppressed and this Court should grant the defendant a new trial.

II. DENIAL OF A LINEUP

The facts relative to the denial of the defendant's request for a lineup appear in the previous section. However, in addition to the argument made there, it must also be noted that *Commonwealth v. Sexton* (supra) requires that where the lineup is denied a specific instruction be given to the jury as to the dangers involved in one-on-one identifications. This was not done as a matter of course in the present case and, therefore, the defendant should be granted a new trial.

III. DENIAL OF BIGHUM MOTION

Prior to the opening of the defense case the defendant made a *Bighum Motion* (*Commonwealth v. Bighum*,

452 Pa. 554, 307 A.2d 255 (1973)) in an attempt to prevent the Commonwealth from introducing any of his prior convictions in order to impeach his credibility when he testified. As a result of this motion, the trial judge ruled that if the defendant should testify on his own behalf, guilty pleas that resulted from a December 1973 robbery and an October 1978 retail theft could be introduced in order to impeach the defendant's credibility. The court erred in making this determination.

In *Commonwealth v. Bighum* (supra), the court made a significant departure from prior practice when it ruled that curative instructions were insufficient when prior convictions were introduced to impeach the credibility of a defendant who elected to testify. Further, the *Bighum* court held that in certain circumstances a defendant's prior record for *crimen falsi* could not be used to impeach him even if he chose to testify.

In *Commonwealth v. Roots,* 482 Pa. 33, 393 A.2d 364 (1978), the court further discussed which factors should be considered in determining the admissibility of a prior criminal record. That court stated:

> In making the determination as to the admissibility of a prior conviction for impeachment purposes, the trial court should consider: 1) the degree to which the commission of the prior offense reflects upon the veracity of the defendant-witness; (2) the likelihood, in view of the nature and extent of the prior record, that it would have a greater tendency to smear the character of the defendant and suggest a propensity to commit the crime for which he stands charged, rather than provide a legitimate reason for discrediting him as an untruthful person; (3) the age and circumstances of the defendant; (4) the strength of the prosecution's case and the prosecution's need to resort to this evidence as compared with the availability to the

> defense of other witnesses through which its version of the events surrounding the incident can be presented; and (5) the existence of alternative means of attacking the defendant's credibility.

393 A.2d at 367. Moreover, the court held that the burden was *not* on the defendant to show that the prejudicial effect of impeachment far outweighed the relevance of the prior conviction but that burden is upon the prosecution to show that the need for this evidence overcomes its inherent potential for prejudice.

In the present case, it is clear from the trial court's inquiry and the opinion written by Judge Mirarchi that emphasis was placed in both incidents on the strength of the Commonwealth's case and the Commonwealth's ability to attack the defendant's credibility by other alternatives (Part of factor 4 and factor 5 as outlined in *Commonwealth v. Roots,* (supra).

Not only were the factors cited misapplied but no apparent consideration was given to that portion of factor 4 which relates to the availability of other witnesses through which the defendant's version of the events surrounding the incident can be presented.

In the present case, the Commonwealth's evidence, although circumstantial, was ruled sufficient to go to the jury. The defendant's version at the offense, which was substantially the same as that given to the police at the time of his arrest, was that he accompanied the victim and others to the Touraine Apartments, because the victim was going to procure some drugs for the defendant; further, that as collateral for money which the defendant gave the victim, the victim gave the defendant a wallet with no money in it but which contained the victim's identification;

that the victim and all but one of the others in the group then left the defendant and never returned to the site of his eventual arrest and the site where he originally met the victim. Such testimony could have been attacked by recalling the victim and questioning him as to whether or not he was involved in a drug transaction. In contrast, the defendant had no other means of presenting his version of the occurrences of August 2, 1980. In fact, the only defense witnesses were the defendant and an investigator from the Defender Association who testified as to his inability to find defense witnesses.

The factors outlined above were designed to *limit* the admission of prior convictions to situations where its introduction is of *essential* evidentiary value to the prosecution and not unreasonably *unfair* to the defense. *Commonwealth v. Roots,* 393 A.2d at 367. (Emphasis provided.)

Since the admission of the defendant's prior convictions were not essentiel to the prosecution and grossly prejudicial to the defendant, the Court erred in permitting their admission and the defendant should be granted a new trial.

IV. CHARGE ON ACCOMPLICE LIABILITY

At the conclusion of the trial and over the objections of the defense, the trial court charged the jury to the effect that the defendant could be found guilty of the charges involved if the jury found that the acts which were the basis of those charges were committeed by an accomplice. The giving of such a charge was error.

The Pennsylvania Crimes Code, provides for the liability of a defendant for the acts of an accomplice and defines thusly:

(c) Accomplice Defined.—A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; or

(2) his conduct is expressly declared by law to establish his complicity. 18 C.P.S.A. Section 306(c).

The lower court in its opinion justified the giving of the accomplice charge because the facts established that the defendant was with a group of males who entered the Tourane (sic) Apartments with the victim and witnesses identified the defendant as one of the two men leaving the apartment shortly before the victim was found burned and unconscious. (Opinion pp 14 and 15.) However, it has been held, as a matter of law, that such evidence is insufficient to establish liability for an accomplice.

In *Commonwealth v. Fields,* 460 Pa. 316, 333 A.2d (1975) the Court held that:

> In our view, the Commonwealth's evidence was inadequate, as a matter of law, to establish beyond a reasonable doubt that Fields was an active partner in Gause's intent to shoot Press. Read in the light most favorable to the Commonwealth, the record proves that Fields arrived at the scene of the shooting with "Boonie," the killer; that he *may* have asked Press if he "was from 29;" that after "Boonie" shot Press, Fields ran from the scene with "Boonie." There is nothing in the testimony to indicate Fields had any prior knowledge of Gause's lethal intent or that he in anyway counseled or participated in the shooting. Under the circumstances, the proof left too much to conjecture.

333 A.2d at p. 747.

The Supreme Court of Pennsylvania has held on numerous occasions that while proof of one's status as an accomplice may be established by circumstantial evidence, the proof must lead to more than suspicion and conjecture. *Commonwealth v. McFadden,* 448 Pa. 146, 292 A.2d 358 (1972). It has specifically been that neither mere presence at the scene, *Commonwealth v. Leach,* 455 Pa. 448, 317 A.2d 293 (1974), nor flight from the scene of a crime, *Commonwealth v. Roscioli,* 454 Pa. 59, 309 A.2d 396 (1973) are sufficient either in themselves or together to establish that one is an accomplice in the commission of a crime.

In the present case, there is no evidence whatsoever that the actions taken against the victim were done by any more than one person.

Since as a matter of law neither presence nor flight were sufficient to establish the defendant's status as an accomplice, it was error for the trial court to charge on this point.

V. SENTENCE

The defendant was found guilty and sentence was imposed on the following charges: Arson endangering persons (sentenced to 10 to 20 years); Aggravated assault (10 years probation concurrent with the arson charge); Robbery (5 to 10 years consecutive to the arson charge).

On all of the charges the named victim was Thomas Gallagher and all of these crimes occurred on August 2, 1980. The facts, as adduced at trial and as summarized by the lower court in its opinion clearly established that all of these crimes grew out of the same transaction and were part of a single act.

A classic definition of merger can be found in *Commonwealth v. Ashe,* 343 Pa. 102, 21 A.2d 920 (1941) where the court stated:

> The true test of whether one criminal offense has merged in another is *not* (as is sometimes stated) whether the two criminal acts are "successive steps in the same transaction" but it is whether one crime *necessarily involves* another, as, for example, rape involves fornication, and robbery involves both assault and larceny. The "same transaction" test is valid only when "transaction" means a *single act.* When the "transaction" consists of two or more criminal acts, the fact that the two acts are "successive" does not require the conclusion that they have merged. Two crimes *may be* successive steps in *one* crime and therefore merge, as, e.g., larceny is merged with robbery, and assault and battery is merged in murder, or they may be two distinct crimes which do not merge.

21 A.2d at 291.

In the present case, the defendant was charged with (sic) found guilty of robbery, in that in the course of committing a theft he inflicted serious bodily injury on another. The method of inflicting that injury was the setting of a fire on the back of the robbery victim, Thomas Gallagher. Since the assault and the arson were the means by which the defendant inflicted the serious bodily injury upon the robbery victim, they are all part of a single act and since they comprise a mandatory element of the crime of robbery they must be deemed to merge for sentencing purposes.

Accordingly, if this court does not see fit to grant any of the other relief previously requested it should vacate the sentences imposed on Bills of Information November

Term, 1980 #487 (Arson) and #490 (Aggravated Assault).

VI. EFFECTIVENESS OF COUNSEL

The defendant was denied effective assistance of counsel for numerous reasons. Some of the actions or admissions are ascertainable from the record; however, because the trial court refused to grant the defendant a hearing at the time of argument on his post-trial motions when he attempted to raise this issue, the record is silent as to other alleged ineffective acts. (N.T. 4/28/81, p. 6.)

Normally, "issues" not raised in post-trial motions will not be considered on appeal. An exception to this exists, however, when ineffective assistance of prior counsel is raised. The rule then is that ineffectiveness of prior counsel must be raised at the earliest stage in the proceedings at which counsel whose ineffectiveness is being challenged no longer represents the appellant. See *Commonwealth v. Seachrist,* 478 Pa. 619, 387 A.2d 661 at 663 (1978)

In the present case, the appellant's present counsel did not represent him during trial; therefore, the issue of trial counsel's ineffectiveness is properly raised in this appeal.

The often quoted standard used in determining whether a defendant has received effective assistance of counsel is " . . . counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest." *Commonwealth ex rel. Washington v. Maroney,* 427 Pa. 599 (1967). The test is not "whether other alternatives were more reason-

able, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis." *Commonwealth v. Weaver,* 219 Pa. Superior 274 (1971).

In the present case, the defendant was represented by the Defender Assocation of Philadelphia and it and its representatives will be referred to in this brief as trial counsel even though more than one person's acts are being referred to.

First, trial counsel intentionally absented himself from a scheduled lineup which the defense had requested for reasons unrelated to the defendant's case. The facts surrounding this action are fully described in sections I and II of this Argument. As a result of this action on the part of trial counsel, the defendant was denied the opportunity to participate in a lineup and was subjected to a "defective" photo array identification procedure. In relation to this procedure, trial counsel compounded this error by failing to request a point for charge as to the unreliability of one-on-one identifications as provided by *Commonwealth v. Sexton,* (supra).

Trial counsel also failed to adequately prepare the defendant's case. The defendant did not see trial counsel until approximately two weeks prior to trial. Because of this delay a potentially helpful witness to the defense was unable to be located in time for trial. This witness was an employee of the restaurant where the defendant was arrested and that restaurant went out of business prior to the trial. This lack of preparedness also extended to failing to discuss with the defendant in time to properly effectu-

ate the defendant's desires, his right to a jury trial or his option to waive a jury trial.

The defendant also alleges that during his trial, trial counsel was under the influence of alcohol, refused to abide by the defendant's wishes in exercising his peremptory challenges, and did not obtain and review with the defendant the notes of defendant's testimony from the suppression hearing, when said notes were available prior to the defendant's testifying at the trial.

Finally, trial counsel was ineffective for failing to preserve in his post-trial motions challenges to the sufficiency and weight of the evidence and for not raising the issue of the illegality of the sentence imposed.

For the reasons outlined in this section, the defendant requests that if a new trial is not granted pursuant to the other arguments presented herein, that this matter be remanded to the lower court for an evidentiary hearing to determine the effectiveness of trial counsel.

CONCLUSIONS

For the reasons set forth in sections I through IV of the foregoing Argument, the defendant's conviction should be reversed and a new trial ordered. In the alternative, for the reasons set forth in section V of the Argument, sentence should be vacated on Bills of Information # 487 and # 490 and the matter should be remanded to the lower court for an evidentiary hearing pursuant to the reasons set forth in section VI of the Argument.

Respectfully submitted,

/s/ Vincent T. Snyder
VINCENT T. SNYDER, ESQUIRE
ATTORNEY FOR APPELLANT

J-905 (1983)

COMMONWEALTH OF PENNSYLVANIA	)	IN THE SUPERIOR COURT OF
v.	)	PENNSYLVANIA
MICHAEL PEOPLES,	)	No. 1335 Philadelphia 1981
Appellant	)	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ J. Haniel Henry
J. Haniel Henry
PROTHONOTARY

Dated: September 16, 1983

J-905 (1983)

COMMONWEALTH OF PENNSYLVANIA	)	IN THE SUPERIOR COURT OF
v.	)	PENNSYLVANIA
MICHAEL PEOPLES,	)	No. 1335 Philadelphia 1981
Appellant	)	

Filed September 16, 1983

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County, November Term, 1980, No. 487, 490, 491.

Before: WICKERSHAM, WATKINS and MONTGOMERY, JJ.

PER CURIAM: FILED SEP 16 1983

Judgment of sentence affirmed.

J-905 (1983)

COMMONWEALTH OF PENNSYLVANIA	)	IN THE SUPERIOR COURT OF
v.	)	PENNSYLVANIA
MICHAEL PEOPLES,	)	No. 1335 Philadelphia 1981
Appellant	)	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County, November Term, 1980, No. 487, 490, 491.

Before: WICKERSHAM, WATKINS and MONTGOMERY, JJ.

MEMORANDUM OPINION

Appellant Michael Peoples was convicted of arson (endangering persons), aggravated assault and robbery following a jury trial before the Honorable James T. McDermott. Following the denial of post-verdict motions and sentencing, he filed this direct appeal.

On this appeal, appellant raises several issues which are thoroughly discussed by the Honorable Charles P. Mirarchi, Jr., in his opinion dismissing post-verdict motions. These are: (1) whether the suppression court properly denied appellant's motion to suppress identification; (2) whether it was proper to deny appellant's request for

a lineup; (3) whether the trial court erred in permitting the use of two prior convictions to impeach appellant's credibility; and (4) whether it was error for the trial court to charge the jury on accomplice liability. Our review of the record shows these issues to have been adequately disposed of in Judge Mirarchi's opinion and require no further comment from use (sic).

The other issues argued by appellant were not raised at the trial level. First, appellant argues that the arson and assault convictions merge with the robbery conviction and that it was, therefore, error to sentence him on all three convictions. Because merger questions the legality of the sentence, this issue is not waived because of appellant's failure to raise it before the trial court. *Commonwealth v. Kerr,* 298 Pa.Super. 257, 444 A.2d 758 (1982).

The test for merger is whether one crime necessarily involves the other; that is, the essential elements of one must also be essential elements of the other. *Commonwealth v. Everett,* 290 Pa.Super. 344, 434 A.2d 785 (1981). The Commonwealth's evidence revealed the following facts: the victim was hit on the back of the head; he was kicked in the stomach; he was forced into an apartment building elevator, he was set on fire; his wallet and watch were gone when he was discovered. At least three people were involved in the incident. The victim was unable to recall the precise sequence of events. He spent 21 days in the hospital with injuries to his bladder and pancreas and second and third degree burns to his back and hands. Clearly, arson, which involves intentionally setting a fire which recklessly places another in danger of bodily injury, and robbery, which involves the threat or infliction of

serious bodily injury during the course of committing a theft, do not share the same essential elements. As to the aggravated assault, the jury could have found that the assault took place after the robbery and, thus, the two convictions would not merge.[1] *Commonwealth v. Myers,* 202 Pa. Super. 214, 195 A.2d 813 (1963).

Appellant next argues that trial counsel was ineffective in various respects. Since appellant is now represented, for the first time, by counsel other than trial counsel, this issue is reviewable. *Commonwealth v. Lewis,* 463 Pa. 180, 344 A.2d 483 (1975).

Appellant contends that trial counsel was ineffective because: (1) counsel deliberately absented himself from a scheduled lineup; (2) counsel was inadequately prepared; (3) counsel was intoxicated during the trial; and (4) counsel failed to preserve the issues of merger and sufficiency of the evidence in post-trial motions. These arguments are without merit.

The lineup at which counsel was not present was cancelled due to appellant's own actions in altering his appearance. Since there was no lineup, counsel's absence could not prejudice appellant. *Commonwealth v. Knox,* Pa.Super. , 450 A.2d 725 (1982). Appellant's allegations that trial counsel was inadequately prepared and intoxicated are belied by the record and appellant has not offered any evidence from which we, or the trial court, could

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1. Robbery itself does not necessarily include the elements of aggravated assault since a robbery may be committed by putting another in fear of immediate serious bodily injury even though no injury is actually inflicted. 18 Pa.C.S.A. § 3701.

conclude that such was the case. We will not consider appellant's claim without such specific factual allegations. *Commonwealth v. Pettus,* 492 Pa. 558, 424 A.2d 1332 (1980).

Counsel's failure to preserve the issues of merger and sufficiency of the evidence have not worked any prejudice to appellant either. As stated above, the issue of merger has not been waived and is meritless anyway. The issue of the sufficiency of the evidence is adequately disposed of by Judge Mirarchi in his opinion and we have nothing to add to his analysis. Although error may have occurred, appellant has not shown how that error has prejudiced him and he is, therefore, not entitled to relief. *Commonwealth v. Knox, supra.*

Judgment of sentence affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

Commonwealth of Pennsylvania	)	Re: Superior Court of Pennsylvania No. 1335 Philadelphia, 1981
v.	)	
Michael Peoples, Appellant	)	Misc. dkt. No. ———

PETITION FOR ALLOWANCE TO FILE APPEAL TO REVIEW ERRORS OF SUPERIOR COURT WITH APPOINTMENT OF NEW COUNSEL

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SAID COURT:

Comes now, Michael Peoples, pro se, who respectfully submits this petition or allowance to appeal pursuant to 42 Pa. C.S.A. Section 524 and Rules of Appellate Procedure, 1113 et seq. and he assigns these reasons:

1. Petitioner Michael Peoples is confined at State Correction Institution in Huntington, Pennsylvania where he is serving sentence of fiftee.. (15) years to fourty (40) years imprisonment by the Honorable James McDermott of the Common Pleas Court of Philadelphia County after jury conviction for arson and robbery at Nos. 487 and 491 November Term, 1980.

2. On September 16, 1983 the Superior Court of Pennsylvania, No. 1335 of Philadelphia, 1981 affirmed judgment of sentence and conviction for which this current pro se petition for allowance for appeal is being filed.

3. Petitioner believes that he was denied his Federal and State constitutional rights to have effective as-

sistance of counsel during the State's first direct appeal in violation of, *Douglas V. California,* 372 U.S. 353 (1963) because court appointed appellate counsel, Vincent T. Snyder, Esquire failed to raise and argue meritorious claims of error during trial, at post-verdict and post-sentence levels and stages of this case and failed to raise and argue ineffectiveness of former counsel who represented this petitioner in the following errors which occurred to prejudice petitioner:

(a) Notice of direct appeal had been filed in this case to Superior Court on May 5, 1981, but Honorable Judge James McDermott, who was then Common Pleas court Judge, although duly served with copy of notice of appeal; failed to follow Pennsylvania Rules of Appellate Procedure to timely write or file any opinion for petitioner's direct appeal.

(b) Thus, petitioner suffered prejudice as a result of Honorable Judge McDermott's failure to write or file any timely opinion as required by law; all of which denied petitioner his rights afforded to all other citizens accused of crimes in Pennsylvania and therefore denied petitioner his Federal and State constitutional rights to have access timely to the appellate court to review his legal claims inviolation (sic) of the first, sixth, eighth and fourteenth amendments of the United States Constitution. *Bounds V. Smith,* 430 U.S. 817 (1976) because petitioner suffered *intentional inordinate* delay from the time of filing his direct appeal; a period of inactivity occured over one full year until another Judge, The Honorable Charles P. Mirarchi, Jr. wrote and filed an opinion in this case dated June

8, 1982. However, during that period of intentional delay petitioner was caused to suffer prejudice of incarceration with any effective or meaningful appeal review under the sentence imposed in this case.

(c) Furthermore, petitioner was prejudiced because Honorable Judge James McDermott failed to write and file opinion as required by law when he deliberately and intentionally refused and failed to perform his Judicial duties and responsibilities as a Common Pleas Court Judge at a time when he was too busy participating in a campaign and election for Justice of the Pennsylvania Supreme Court; all of which then resulted in no opinion being written and filed in this case to cause not only delay and incarceration of petitioner, but, moreover, then required a substitution of Judges to write and file the lower court's opinion; the Honorable Charles P. Mirarchi, who was not the presiding trial Judge nor post-verdict motions Judge and merely substituted for former Judge McDermott although petitioner never knowingly nor intentionally waived his rights and in fact exercised his rights to have Judge McDermott write and file the opinion required by law when he had timely served Judge McDermott with copy of the notice of appeal. This State procedure denied petitioner his Federal constitutional rights for a full and fair hearing over his legal claims; in violation of equal protection and due process of the laws under the Fourteenth Amendment of the United States Constitution.

(d) Trial counsel was ineffective for failing to object and failing to raise and argue the trial prosecutor's prejudicial misconduct during the trial before the jury when

the prosecutor *intentionally* cross-examined petitioner on the witness stand when he testified on his own behalf as the defendant about other prior criminal convictions; all of which violated clear and express State Statute prohibitions for examining the defendant when he testifies as a witness in his own behalf. See (attached exhibits submitted hereto State Trial Transcript, Page 282 which shows prosecutor Mr. Bello's illegal cross-examination of defendant before the jury.)

This prosecutorial misconduct violated State Statute which all other similarly situated State citizens where and are entitled to receive a fair trial under the established criminal procedural standards. See, 19 P.S., Section 711; repealed substantially the same; 42 Pa. C.S.A., Section 5918.

Also see, *Commonwealth V. Schmidt,* 463 A. 2d 1175 (July 29, 1983)

Appellate counsel, Vincent T. Snyder, Esquire, rendered ineffective assistance of counsel on direct appeal for failing to raise and to argue the above meritorious claim for relief before Pennsylvania Superior Court, although petitioner even wrote counsel a letter dated January 20, 1983 and requested him to raise and argue such meritorious claim in his behalf, but counsel failed to reasonably include said claim in his appellate brief and there was no legitimate stratedy (sic) for appellate counsel having failed to perform his legal assistance to raise and argue said claim because petitioner had been deprived his State Statutory right to a fair trial and relief of a new trial was entitled to

petitioner by the prosecutor's intentional prejudicial misconduct to cross-examine petitioner about prior criminal convictions prohibited by Statute.

See, *Commonwealth V. Gray,* 443 A. 2d 330 (1982) (Violation of State Statute not harmless error even where evidence of guilt overwhelming)

(e) The trial court and Superior Court committed error by upholding the unlawful ruling by violating, *Commonwealth V. Bighum,* 452 Pa. 554 to deprive petitioner of his Federal Sixth Amendment constitutional right to present his only meaningful defense of testifying in his own behalf and allowing the Commonwealth to use evidence of unrelated prior robbery and theft criminal convictions before the jury to discredit defendant's trial testimony.

(f) The trial court and Superior Court committed error by ruling unlawfully that petitioner could not have a trial by Judge and forced him to receive a trial by jury when petitioner expressly requested trial by Judge; all of which violated petitioner's Federal and State constitutional rights to equal protection and Due Process of the laws under the Fourteenth Amendment of the United States constitution because all other similarly situated State criminal defendants are granted the choice to have trial by jury or trial by Judge, but petitioner was arbitrarily and capriciously denied by the lower court's ruling denying him the right to trial by Judge when there were no reasonable guidelines for Judges to follow when either allowing or denying trial by Judge. Thus, petitioner was denied Federal Due Process by the State's arbi-

trary and capricious trial Judge procedure which was refused petitioner upon express request.

Compare: *U.S. EX REL. Matthews V. Johnson,* 503 F. 2d 339 (3rd Cir. 1974) (Arbitrarily allowing some defendants voluntary manslaughter legal instruction while refusing others denied Federal Due Process)

Here, the petitioner requested trial by Judge instead of jury, but the lower court refused that request under the false impression that the Commonwealth could force a jury trial upon the criminal accused. But, your Supreme Court held such procedure a violation of the accused's right to seek trial by Judge.

Commonwealth V. Sorrell, 456 A. 2d 1326 (1982) Also see, *Commonwealth V. Maxwell,* 459 A. 2d 362 (May 25, 1983)

(g) The pre-trial suppression court and Superior Court both committed error by refusing to suppress an unnecessary suggestive photo array identification irreparable of misidentification of prosecution witnesses, Mr. Wright and Mr. Hassano and for finding that an independent basis existed, when none did, for in-court identification although the in-court identification was "tainted" from the prior unnecessary suggestive photo array procedure wherein petitioner was unduly and unreasonably singled out as only man with large afro hair. Thus, violating petitioner's Federal and State constitutional rights to Due Process of the laws under the Fourteenth Amendment of the United States constitution.

There was no independant (sic) basis for the in-court identifications and the prior 'taint' resulted in an illegal misidentification of petitioner.

See, *United States V. Higgins,* 458 F. 2d 461 (3rd Cir. 1972)

Furthermore, the lower trial court, Municiple (sic) court of Philadelphia County had refused petitioner's request for a pre-trial line-up in order to timely attack and challenge the tainted illegal photo array identifications made by Mr. White and Mr. Hassano, but the Municiple (sic) court denied such line-up for petitioner and violated, *Commonwealth V. Sexton,* 485 Pa. 17 (1979) (Mandating right of the criminal accused for line-up to test validity of identification)

Thus, by denying petitioner the same rights all other State accused citizens are afforded for line-up procedure it deprived the petitioner his rights for a full and fair hearing in the State courts and deprived him equal protection and due process of the laws as guaranteed under the Fourteenth Amendment of the United States constitution.

(h) Trial counsel was ineffective for failing to timely object and pursue raising and arguing constitutional error of prosecution introducing evidence of petitioner's implied guilt; which unconstitutionally shifted burden of proof to petitioner to disprove essential element of crimes charged, to wit, identification, when the prosecution intentionally elicited evidence from its witness, Lt. Margulie about having to cancel an line-up scheduled for identification when they seen defendant and believed that he changed his appearance by having cut his afro hair since time of arrest. (See, State trial transcript Pages 219-220)

That evidence was used unlawfully to show that defendant altered his appearence and thus draw in-

ference of his guilt; all of which unconstitutionally shifted burden of proof to defendant at trial to explain his conduct to disprove essential element of identification; rather than Commonwealth's burden of proving it.

Thus, petitioner's Federal and State constitutional rights were violated by this unconstitutional burden shifting to defendant. Compare: *Commonwealth V. Moyer,* 466 Pa. 464 (1976); *Commonwealth V. Williams,* 463 Pa. 370 (1975); *Mullaney V. Wilbur,* 421 U.S. 684 (1975); *Patterson V. New York,* 432 U.S. 197 (1977)

Trial counsel and direct appeal counsel rendered ineffective assistance for failing to object timely or failing to raise and argue the unconstitutional burden shifting to petitioner to explain his alleged conduct and thus infer his guilt upon essential element of identification or require petitioner to disprove his guilt by explaing (sic) his conduct to the jury not to infer his guilt from allegedly changing or altering his hair appearance following his arrest.

See, *IN RE Winship,* 397 U.S. 458 (1970) (The government must carry the burden of proof at all times upon essential elements of crimes charged beyond a reasonable doubt standard.)

(i) Trial counsel was ineffective and appellate counsel ineffective for failing to raise and argue use of prejudicial unrelated crimes evidence against petitioner before the jury when there was no reasonable nor proper foundation for admissibility of the evidence and that evidence was severally prejudicial to deny

and deprive petitioner his fundamental constitutional right to receive a fair trial before the jury.

The prosecution sought to introduce evidence from the Philadelphia Clerk of Court to show that a court order had been entered for a line-up which also prohibited defendant from changing or altering his appearance in any way until the time of line-up, but there was no evidence showing that defendant was aware of nor in fact given notice of that court order. Thus, the jury was falsely lead to believe that defendant was aware of said court order and deliberately violated the court order; thus committing an unrelated criminal offense, to wit, criminal contempt of court, punishable by imprisonment and fine.

Trial counsel was ineffective for stipulating to this unrelated crimes evidence related to the Clerk of Court so testifying since there had already been adequate testify for the jury to show the line-up was cancelled and that defendant had changed or altered his appearence, thus, introduction of the unrelated crimes evidence, to wit, criminal contempt of court, served no probative value and was extremely prejudicial to deny fair trial. (See, State trial transcript, Page 228-229)

Commonwealth V. Nichols, 485 Pa. 1 (1979); *Commonwealth V. Washington,* 488 Pa. 133 (1979); *Commonwealth V. Spruill,* 480 Pa. 601 (1978)

(j) After the Commonwealth rested its case the trial court gave the jury legal instruction, over defense objection, that it could find defendant guilty of the charges

involved if the jury found that the acts which were the basis of the charges were committed by an accomplice. That legal instruction was error and in violation of State law and also unconstitutional because it allowed the Commonwealth to obtain its criminal conviction on pure speculation, surmise, guess-work and conjecture without any evidence to satisfy proof beyond a reasonable doubt.

See, *In Re Winship,* 397 U.S. 458 (1970)

Here, the only evidence submitted by the Commonwealth was that petitioner had been seen with a group of other men going into the same aparyment (sic) building and coming out therefrom and then finding the victim burned and robbed.

Your Supreme court has often held "mere presence" with another and "flight" are insufficient to establish conviction under the principle of accomplice theory.

See, *Commonwealth V Fields,* 460 Pa. 316 (1975); *Commonwealth V. McFadden,* 448 Pa. 146 (1972)

Moreover, the lower court's legal instruction to the jury was unconstitutional because it illegally shifted the burden to the defendant to disprove his guilt when the Commonwealth was allowed to draw upon inferences of guilt for essential elements when petitioner's mere presence and flight with other men had been shown; thus, violating the unconstitutional burden shifting rational of the United States Constitution.

See, *Standrom* (sic) *V. Montana,* 442 U.S. 510 (1977)

WHEREFORE, for all of the foregoing reasons your Honorable Supreme Court should grant the pro se petition of Michael Peoples for allowance to appeal the constitutional and Statutory errors of the lower court and the Superior court and to order appointment of new counsel who can raise and argue ineffective assistance of former trial, post-verdict and appellate counsel.

Respectfully Submitted,

_____

DISTRICT ATTORNEY'S OFFICE
1300 CHESTNUT STREET
PHILADELPHIA, PENNSYLVANIA 19107

(SEAL)

EDWARD G. RENDELL
DISTRICT ATTORNEY

October 31, 1983

Marlene F. Lachman, Prothonotary
Supreme Court of Pennsylvania
Room 468—City Hall
Philadelphia, Pennsylvania 19107

Re: Commonwealth v. Michael Peoples
No. 617 E.D. Allocatur Docket 1983

Dear Ms. Lachman:

Defendant requests appointment of counsel to assist him in filing a Petition for Allowance of Appeal. The Commonwealth requests this court to remand this matter to the Honorable Charles P. Mirarchi, Jr. for a decision on whether defendant is entitled to appointment of free counsel, pursuant to this court's usual practice.

The Commonwealth will not, therefore, respond to defendant's numerous *pro se* complaints of ineffective assistance of counsel at this time. If this court wishes a response on the merits of these claims, the Commonwelth will file a prompt answer upon request.

Respectfully submitted,

/s/ Robert B. Lawler
Robert B. Lawler
Chief, Appeals Division

cc: Michael Peoples

[PENNSYLVANIA SUPREME COURT ORDER]

November 14, 1983. Petition for appointment of counsel to file petition for allowance of appeal granted. Matter referred to Court of Common Pleas of Philadelphia for appointment of counsel to assist petitioner in filing a petition for allowance of appeal, which shall be filed within thirty days of counsel's appointment. Notice of counsel's appointment to be given promptly to this Court.

/s/ Per Curiam

Mr. Justice McDermott did not participate in this matter.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 617 E.D. ALLOCATUR DKT. 1983

COMMONWEALTH OF PENNSYLVANIA
Respondent

vs.

MICHAEL PEOPLES
Petitioner

PETITION FOR ALLOWANCE OF APPEAL

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE SUPERIOR COURT DATED SEPTEMBER 16, 1983 AT NO. 1335 PHILADELPHIA, 1981 AFFIRMING THE JUDGMENT OF THE SENTENCE OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY ON APRIL 28, 1981, NOVEMBER TERM, 1980, NOS. 0487, 0490 and 0491

STEPHEN P. GALLAGHER, ESQUIRE
STACK & GALLAGHER, P.C.
1600 Locust Street
Philadelphia, Pa. 19103
(215) 735-6500
Attorney for Petitioner

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	)	NO. 617
vs.	)	E.D. ALLOCATUR DTK. 1983
MICHAEL PEOPLES	)	

PETITION FOR ALLOWANCE OF APPEAL
TO THE CHIEF JUSTICE AND JUSTICES OF THE SAID COURT:

Petitioner, Michael Peoples, by his attorney, STEPHEN P. GALLAGHER, ESQUIRE, herewith applies to this Honorable Court for allowance of appeal of an Order of the Superior Court filed on September 16, 1983 wherein the Superior Court of Pennsylvania affirmed a judgment of the Court of Common Pleas of Philadelphia County.

The Petitioner, Michael Peoples, who was represented by the Public Defender was tried before a jury with the Honorable James McDermott presiding and was found guilty of Arson, Endangering Persons, Aggravated Assault and Robbery on January 16, 1981. Post-trial Motions were argued on April 28, 1981, said Motions were denied and the Petitioner was sentenced as follows: On Bill No. 487—November Term, 1980—to be committed to the State Correctional Institution at Graterford for a period of not less than ten (10) years nor more than twenty (20) years; on Bill No. 490—November Term, 1980—the Petitioner was sentenced to a ten (10) year period of probation to run concurrently with the sentence imposed on Bill No. 487; on Bill No. 491—November Term, 1980—the sentence was to a period of incarceration of not less than five (5) years nor

more than twenty (20) years to run concurrently to the sentence imposed on Bill No. 487.

An Opinion was filed by the Honorable Charles P. Mirarchi of the Court of Common Pleas who was assigned the case for that purpose, as Judge McDermott was elected to the Supreme Court of Pennsylvania. Said Opinion is attached hereto and marked Exhibit "A".

The Petitioner appealed the Judgment of Sentence to the Superior Court of Pennsylvania.

Petitioner was represented on said appeal by court-appointed counsel who was not trial counsel. Petitioner's appellant (sic) counsel raised one issue that was not raised in the lower Court. Said issue alleged that petitioner was deprived of effective assistance of counsel in that his trial counsel:

(a) failed to show up at a scheduled line up thereby denying him a line up;

(b) counsel was inadequately prepared;

(c) counsel was intoxicated;

(d) counsel failed to preserve issues of merger and the issue, sufficiency of the evidence.

Petitioner's appellant (sic) counsel failed to raise in his appeal the issues whether trial counsel was ineffective in failing to preserve the issue; that the Commonwealth's representative committed reversible error in cross-examining the petitioner as to his prior criminal record in violation of the Pennsylvania Statute, 42 Pa. C.S. § 5918. Petitioner's attorney on appeal to the Superior Court also failed to raise on appeal the issue that the trial Court committed reversible error in refusing petitioner's Motion

to Suppress the physical evidence and statement as such evidence was obtained as a result of an alleged arrest.

Petitioner by his new appellant (sic) counsel who did not represent him at trial nor did he represent petitioner on his direct appeal to the Superior Court, files this Petition for Allowance of Appeal for the following reasons:

A. It is absolutely clear from the record that the Assistant District Attorney in this case cross-examined the Petitioner concerning his prior criminal record. The record reads as follows:

CROSS-EXAMINATION

BY MR. BELLO:

Q. MR. PEOPLES, SO WE CAN CLARIFY THIS, YOU WERE GUILTY OF ROBBERY, 1973, IS THAT CORRECT?

A. YES.

Q. YOU WERE GUILTY OF ROBBERY IN 1974, IS THAT CORRECT?

A. THAT IS CORRECT.

Q. YOU WERE GUILTY OF RETAIL THEFT IN 78, IS THAT CORRECT?

A. THAT IS CORRECT.

(N.T. p. 282)

Q. WAIT A MINUTE, MR. PEOPLES. THE ONLY ONE SAYING THAT IS YOU, WHO HAS TWO ROBBERY CONVICTIONS, ONE THEFT CONVICTION — —

MR. BOOKER: OBJECTION, YOUR HONOR. THIS IS JUST ARGUING BACK AND FORTH.

(N.T. p. 300)

Under the case law of *Commonwealth v. Moore,* 369 A.2d 862 246 Pa. Super. 163 (1977) and *Commonwealth v. Vicki Schmidt,* 463 A.2d 1175 (1983), this cross-examination was clearly reversible error and the Supreme Court should allow this Petition for Allowance of Appeal and reverse the judgment of the trial Court and grant a new trial.

Further, at the Suppression Hearing in this case, the arresting officer clearly stated that the Petitioner was arrested "for investigation", a term which clearly is the opposite of "probable cause". Suppression N.T. p. 89 and p. 96. Therefore, the physical evidence and the statement obtained as a result of this illegal arrest should have been suppressed.

There does not appear from this record any reasonable basis designed to effectuate the Petitioner's interest in appellate's counsel's failure to raise on appeal the trial court's refusal to suppress the physical evidence and the oral statement obtained as a result of an "arrest for investigation". Therefore, Petitioner claims he was denied effective assistance of counsel on his direct appeal and requests this Court to grant the Petition for Allowance of Appeal and decide the issue directly or in the alternative, grant the Allowance of Appeal and remand this case for an evidentiary hearing (See *Commonwealth ex rel. Washington v. Maroney,* 427 Pa. 599 (1967).)

Petitioner, by his counsel, Stephen P. Gallagher, Esquire, further requests that the Supreme Court allow this Petition for Allowance of Appeal and then remand the case to the trial court in order than an evidentiary hearing can be held to determine whether or not the issues raised by appellate counsel in the direct appeal constituted ineffec-

tiveness of counsel as this cannot be determined from the record alone.

CONCLUSION

The Petitioner requests the Supreme Court to grant this Petition for Aliowance of Appeal and to decide the substantial issues raised in this Petition or in the alternative, grant the allowance of appeal and remand this case to the trial court for an evidentiary hearing.

Respectfully submitted,

/s/ Stephen P. Gallagher
Stephen P. Gallagher, Esquire
Attorney for Petitioner

(SEAL)

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

November 8, 1985

Stephen P. Gallagher, Esquire
STACK & GALLAGHER
1600 Locust Street
Philadelphia, PA 19103

Re: COMMONWEALTH OF PENNSYLVANIA v. MICHAEL PEOPLES, Petitioner No. 617 E.D. Allocatur Docket 1983

Dear Mr. Gallagher:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"November 4, 1985.

Petition Denied.

Mr. Justice McDermott did not participate in the consideration or decision of this matter.

Per Curiam."

Very truly yours,
/s/ Patrick Tassos
Patrick Tassos
Deputy Prothonotary

/pj
cc: Robert B. Lawler, Esquire

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
FORM FOR USE IN APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

(Full name): Michael Peoples, PETITIONER

(Include name under which you were convicted)

CASE NO. 86-4458. (Supplied by the Court)

vs.

(Name of Warden, Superintendent, Jailor, or authorized persons having custody of petitioner): Thomas Fulcomer, Superintendent, RESPONDENT.

and

Additional Respondent: THE ATTORNEY GENERAL OF THE STATE OF Pennsylvania.

Name: Michael Peoples; Prison Number: M-4559

Place of Confinement: Drawer R State Correctional Inst. Huntingdon, Pa. 16652

[DIRECTIONS DELETED]

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Philadelphia Criminal Division, Court of Common Pleas
2. (a) Date of Judgment of conviction: 1/16/81

   (b) Indictment number or numbers: 0487, 0490, 0491 November Term, 1980
3. Length of sentence: 15 yrs. to 30 yrs. Sentencing Judge: James McDermott
4. Nature of offense or offenses for which you were convicted: Arson, Robbery, Aggravated Assault, Endangering Welfare of Another Person

5. What was your plea? (*check one*)

   (a) Not Guilty (X) (b) Guilty ( ) (c) Nolo contendere ( )

   If you entered a guilty plea to one count or or indictment, and a not guilty plea to another count or indictment, give details: Not Guilty Please
6. Kind of trial: (*check one*)

   (a) Jury (X) (b) Judge only ( )
7. Did you testify at the trial? Yes (X) No ( )
8. Did you appeal from the judgment of conviction? Yes (X) No ( )
9. If you did appeal, answer the following:

   (a) Name of court: Superior Court, # 1335 Phila. 1981

   (b) Result: Affirmed Judgment

   (c) Date of Result: 9/16/83

   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: Allowance to appeal, Pa. Supreme Court #617 E.D. 1983 Denied 1985
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (X) No ( )
11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of Court: U.S. District Court # 85-2031

    (2) Nature of proceeding: State Prisoner Habeas Corpus Action

    (3) Grounds raised: (1) Violation Due Process, Inordinate Delay by State Supreme Court upon hearing allowance to appeal action. All

issues raised under allowance to appeal incorporated in habeas corpus

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (X)

(5) Result: Denied for failure to exhaust state remedies

(6) Date of Result: 7/25/85

(b) As to any second petition, application or motion give the same information:

(1) Name of Court: None

(2) Nature of proceeding: None

(3) Grounds raised: None

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result: None

(6) Date of result: None

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court: None

(2) Nature of proceeding: None

(3) Grounds raised: None

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result: None

(6) Date of Result: None

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes ( ) No (X)

(2) Second petition, etc. Yes ( ) No (X)

(3) Third petition, etc. Yes ( ) No (X)

Not applicable because all state remedies were exhausted under direct appeals.

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: Petitioner did file timely direct state court appeals to both Superior and Supreme courts of Pennsylvania without securing relief.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

[PRINTED EXAMPLES DELETED]

A. Ground one: Violation of Mandatory State Statutory law and denial due process 14th amendment in state' arbitrary and capricious refusal of affording relief to petitioner. Supporting FACTS (tell your story *briefly* without citing cases or law): During trial, before the jury, petitioner was prejudiced, because prosecutor violated 19 P.S. Section 711 (recodified 42 Pa. C.S. Section 5918) by examining petitioner regards other unrelated robbery and theft crimes and this was not harmless error due to extremely weak circumstantial case of the State.

B. Ground two: Denial of due process 14th amendment and equal protection of the laws. Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner requested trial by Judge and not jury, which under state law he had a right to do, but trial court mistakenly ruled that he had no right to Judge trial and that commonwealth had right to trial by jury and thus petitioner was denied his state law right enjoyed by all other state citizens except himself which is arbitrary.

C. Ground three: Petitioner suffered irreparable mistaken identification in violation of 14th amendment due process of the law. Supporting FACTS (tell your story *briefly* without citing cases or law.): The police and prosecution used unreasonably suggestive and tainted identification procedures to secure identification testimony at trial, which had no independant origin and was illegal from prosecution witness Mr. Hassano and Mr. Wright being subjected to unnecessarily suggestive photographic police procedures and trial court errored (sic) to admit in-court identifications.

D. Ground four: Ineffective assistance counsel, violation sixth (6th) amendment. Supporting FACTS (tell your story *briefly* without citing cases or law): Prejudicial to petitioner. Counsel failed to exercise reasonable and normal competence pre-trial and during trial; failed to file to suppress illegal arrest, search and seizure evidence (a second stopping and searching of petitioner by police after police had just moments before stopped and searched him) and highly incriminating evidence gathered thereby; admission of unrelated crimes evidence by Clerk

of court in petitioner changing his hair in contempt of court order.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: All grounds were fairly presented to state courts without any relief being granted to petitioner and state remedies were exhausted.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Court appointed, Harvey Booker, Esq., Public Defender Office.

(b) At arraignment and plea: Same above named.

(c) At trial: Same above named.

(d) At sentencing: Same above named.

(e) On appeal: Vincent T. Snyder, Esq., court appointed.

(f) In any post-conviction proceeding: Petition for allowance to appeal Penna. Supreme court, John Dewaid, Esq., court appointed.

(g) On appeal from any adverse ruling in a post-conviction proceeding: None.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (X) No ( ).

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (X).

(a) If so, give name and location of court which imposed sentence to be served in the future: None

(b) And give date and length of sentence to be served in future: None

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (X) Not applicable

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 7-2-86

/s/ Michael Peoples
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PEOPLES	)	CIVIL ACTION
	)	
VS.	)	
	)	
THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY	)	
	)	
AND	)	
	)	
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	)	NO. 86-4458

REPORT—RECOMMENDATION

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE APRIL 1, 1987

Michael Peoples, an inmate currently incarcerated at the State Correctional Insitution in Huntingdon, Pennsylvania has filed a *pro se* petition for a writ of habeas corpus. Petitioner was convicted of arson endangering persons, aggravated assault, and robbery following a jury trial before the Honorable James T. McDermott on January 16, 1981. On April 28, 1981, petitioner was sentenced to a total of fifteen to forty (15-40) years imprisonment with a concurrent ten year probation.

On June 8, 1982, Judge Charles P. Mirarchi, Jr., of the Court of Common Pleas filed a written opinion concerning the denial of petitioner's post-trial motions, following the election of the Honorable James T. McDermott

to the Pennsylvania Supreme Court in November of 1981. Among petitioner's post-trial motions was a claim that he was improperly denied a bench trial. This claim was never appealed after the initial denial by Judge Mirarchi.

Petitioner filed a direct appeal to the Pennsylvania Superior Court on May 11, 1983. The Superior Court affirmed the judgment of sentence on September 16, 1983. *Commonwealth v. Peoples,* 466 A.2d 720 (Pa. Super. 1983). The Superior Court rejected petitioner's claim that the Suppression Court erred in failing to suppress identification testimony. Petitioner never appealed this ruling by the Superior Court.

On June 7, 1985, petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court. Among the issues raised in this petition, was whether appellant (sic) counsel was ineffective for failing to raise in his appeal that trial counsel was ineffective in failing to preserve the issue; that the prosecutor committed reversible error in cross-examining petitioner as to his prior criminal record in violation of 42 Pa.C.S.A. § 5918. Petitioner's Allocatur appeal was denied on November 4, 1985.[1]

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1. This is petitioner's third petition for a writ of habeas corpus. By Order dated December 5, 1984, petitioner's first petition was denied for failure to exhaust state court remedies. Civil Action No. 84-4061, following this U. S. Magistrate's Report and Recommendation of November 15, 1984. Petitioner's second petition for a writ of habeas corpus was denied for failure to exhaust state court remedies on July 15, 1985 when the District Court approved and adopted this U. S. Magistrate's Report and Recommendation of June 27, 1985, Civil Action No. 85-2031.

DISCUSSION

A petition for a writ of habeas corpus by a state prisoner will not be entertained by a federal habeas corpus court unless available state court remedies have been exhausted. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy,* 455 U.S. 509 (1982). Absent highly unusual circumstances the Court may not consider the merits of petitioner's claims unless he has exhausted his remedies with respect to each. *Patterson v. Cuyler,* 729 F.2d 925, 929 (3d Cir. 1984); *Santana v. Fenton,* 685 F.2d 71, 74 (3d Cir. 1982), *cert. denied,* 459 U.S. 1115 (1983). The exhaustion doctrine is designed primarily to protect the state court's role in enforcement of federal law and to prevent disruption of state judicial proceedings. *Rose,* 455 U.S. at 518; *Slotnick v. O'Lone,* 683 F.2d 60 (3d Cir. 1982), *cert. denied,* 459 U.S. 1211 (1983).

A federal habeas corpus court will not hear a constitutional claim for the first time unless petitioner demonstrates cause for the failure to properly present the claim to the state courts and prejudice resulting therefrom. *Wainwright v. Sykes,* 433 U.S. 72, 90-91 (1977), *reh. denied,* 434 U.S. 880 (1977). "An exception [to the exhaustion requirement] is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano,* 454 U.S. 1, 3 (1981).

Petitioner's first claim of prosecutorial misconduct, is based upon the prosecutor's cross-examination of petitioner as to his prior criminal record. Petitioner relies on 42 Pa.C.S.A. § 5918 as support for his claim. The only opportunity the Pennsylvania Court's were given to

address this claim was on petitioner's Allocatur appeal to the Pennsylvania Supreme Court. In that appeal petitioner alleged ineffectiveness of appellate counsel for failing to raise this issue and for not raising trial counsel's ineffectiveness in failing to preserve this issue.

The Pennsylvania Supreme Court has refused to consider as finally litigated on its merits, an issue raised solely in an allocatur appeal. *Commonwealth v. Tarver,* 493 Pa. 320, 426 A.2d 569 (1981). An issue not raised in the lower courts is considered waived and cannot be raised for the first time on appeal. Pa.R.A.P., 302(a).

Since the record is void of any indication that the Pennsylvania Courts were properly presented with this issue and ruled on petitioner's claim of prosecutorial misconduct, this U. S. Magistrate cannot conclude that this claim has been exhausted. The procedurally correct way for petitioner to assert the issue of ineffectiveness of counsel and prosecutorial misconduct which has not been previously litigated is to file a petition for relief under Pennsylvania's Post Conviction Hearing Act, 42 Pa.C.S.A. §§ 9541 *et seq.*

Petitioner's second claim is that he was unconstitutionally denied a bench trial. While this claim was raised in post-verdict motions, it was never brought before an appellate court for review. Petitioner must show cause for the failure to present this claim to the state courts and prejudice resulting therefrom, before a federal habeas court will consider this claim. *Wainwright,* 433 U.S. 72.

Petitioner may assert ineffectiveness of counsel as the cause for his failure to properly present claims to the state courts. However, while these grounds for relief remain open it would be improper for this federal habeas court to consider petitioner's ineffectiveness of counsel claim to show cause for a procedural default. "If a petitioner could raise his ineffectiveness claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim, for which state court review might still be available. *Murray v. Currier,* (sic) — U.S. —, 106 S.Ct. 2639, 2646 (1986).

Petitioner asserts that his identification in court was not admissible as it was a result of illegal and suggestive police procedures. While this claim was raised and denied on its merits before the Pennsylvania Superior Court, it was abandoned on allocatur. Consistent with *Wainwright, supra* the failure to preserve the claim bars federal consideration absent a showing of cause for the default and prejudice resulting therefrom. Petitioner has not demonstrated such to this Court. If petitioner intends to asserts ineffectiveness of counsel as "cause," he must return to the State Courts.

Petitioner also claims that trial counsel was ineffective for failing to file a motion to suppress evidence obtained by an illegal arrest, and that appellate counsel was ineffective in asserting it. These claims were raised for the first time in petitioner's allocatur petition to the Supreme Court. Since this U. S. Magistrate cannot conclude that the Pennsylvania Supreme Court did or would consider the merits of such a claim presented for the first time in an allocatur petition, as previously discussed, these claims cannot be considered by this Court. Petitioner must assert these claims in an action under the Post Conviction Hearing Act.

Petitioner's final claim of trial counsel's ineffectiveness, for failure to object to evidence that petitioner changed his appearance before a line-up, was raised for the first time in this petition for habeas corpus. Therefore, it is clear that petitioner failed to exhaust his state court remedies with respect to this issue. *See, Rose, supra;* 28 U.S.C. § 2254(b).

Petitioner has also filed a request for this Court to provide him with the state trial transcripts in *Commonwealth v. Peoples.* Petitioner has failed to state any reasons for such other than his need to reply to respondent's answers to the habeas corpus petition.

The touchstone of an indigent's motion for a transcript are need and relevance. *United States ex. rel. Williams v. State of Delaware, et al.,* 427 F.Supp. 72, 76 (D.Del. 1976). Indigents are not entitled to a transcript of the trial proceedings for use in habeas corpus matters without a showing of need. *Towler v. Peyton,* 303 F.Supp. 581, 583 (W.D.Va. 1969); citing *United States v. Shoaf,* 341 F.2d 832 (4th Cir. 1964); *United States v. Glass,* 317 F.2d 200 (4th Cir. 1963). Petitioner has not demonstrated the need for the trial transcripts, especially in light of this Court's findings that petitioner failed to exhaust his existing state remedies in claims raised in his habeas petition. It is noted that petitioner's grounds raised in his habeas corpus petition allege no deprivation of requested transcripts or errors contained in the records; indeed he makes no reference to the need for the transcripts at any time.

Accordingly, this United States Magistrate makes the following.

RECOMMENDATION

NOW, this 2nd day of April, 1987, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be Denied and Dismissed without prejudice for failure to exhaust state court remedies. IT IS FURTHER RECOMMENDED that petitioner's motion for this Court to provide him with a complete copy of the state court trial transcripts in *Commonwealth v. Peoples* be Denied. There is no probable cause for appeal.

/s/ Edwin E. Naythons
Edwin E. Naythons
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL PEOPLES	)	CIVIL ACTION
	)	
VS.	)	
	)	
THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY	)	
	)	
AND	)	
	)	
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	)	86-4458

ORDER

MARVIN KATZ, J.

NOW, this 17th day of April, 1987, after careful and independent consideration of relator's petition for a writ of habeas corpus and after review of the Report and Recommendation of the United States Magistrate, it is ORDERED that:

1. The Report and Recommendation is Approved and Adopted.

2. The petition for writ of habeas corpus is Denied and Dismissed without prejudice for failure to exhaust state remedies.

3. Petitioner's motion for state court trial transcripts is Denied.*

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*Petitioner may renew this request if he files P.C.H.A. proceedings before the State Court.

4. There is no probable cause for appeal.

/s/ Marvin Katz
Marvin Katz, J.
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

United States of America EX REL. Michael Peoples	)	
Petitioner	)	
Vs.	)	
Thomas Fulcomer, Superintendent, et al.,	)	No. 86-4458
Respondents	)	

Objections To Magistrate Report/Recommendation

To The Honorable, The Judges Of Said Court:

Pursuant to 28 U.S.C., Section 636 (B) (1) (b) the petitioner files the following objections to the Magistrate report and recommnedation dated April 3, 1987:

1. Petitioner did exhaust his State remedies through an ineffective assistance of counsel claim filed before the Pennsylvania Superior Court who appointed new conflict counsel for such purposes and later with Pennsylvania Supreme Court in a petition requesting allowance for appeal.

   Thus, the Magistrate committed constitutional error because he did raise the ineffective assistance of counsel claim at the first reasonable opportunity to do so which is what Pennsylvania law requires. The claims were properly presented to both Superior and Supreme Court to decide upon the merits and they choose to ignore petitioner's claims and therefore, no further exhaustion is mandated. See, *Swanger v. Zimmerman,* 750 F. 2d 291 (3rd Cir. 1984) "The test of exhaustion

is not whether the state courts have considered a petitioner's claims, but were they given an opportunity to do so."

Petitioner Peoples gave both Superior and Supreme court ample and reasonable opportunity to do so.

2. The Magistrate committed constitutional error, page 3 note 1 when failing to properly find exhaustion after two prior attempts to secure state court remedies upon the constitutional claims raised in this third petition for which the states courts caused inordinate delays of nearly four (4) years while he was under appeal, and thus, "further resort to Pennsylvania courts upon similar claims would be a futile gesture since state remedies already proved to be totally inadequate to protect petitioner's Federal rights."

3. Violation of State Statute, 42 PA. C.S.A., Section 5918 (Magistrate report, page 4) was prosecutorial misconduct so egregious as to amount to penalty for petitioner exercising his right to testify and present a defense on his own behalf. Compare: *Rock v. Arkansas,* No. 86-130, 41 CrL. 4003 U.S. Supreme Court (Right of defendant to present testimony on their own behalf not to be obstructed by state authority).

4. Page 4-5 of Magistrate report is Constitutional error because all citizens, except petitioner, were protected under State Statute law to exercise right to bench trial in felony cases, but petitioner was deprived due process.

5. Constitutional error, page 6-7 counsel rendered ineffective assistance in failing to file proper and timely

fourth amendment violation for illegal arrest and search and seizure of crucial evidence related to identification and supporting prosecution's theory of guilt to obtain conviction. See, *Morrison v. Kimmelman,* — F.2d — (3rd cir. 1985).

Wherefore, the Magistrate report/recommendation should not be approved nor adopted and habeas corpus relief is entitled to petitioner.

Respectfully Submitted,

/s/ Michael Peoples

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

MICHAEL PEOPLES	)	CIVIL ACTION
	)	
v.	)	
	)	
THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY	)	
	)	
and	)	
	)	
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	)	No. 86-4458

ORDER

AND NOW, this 21st day of April, 1987, it is hereby ORDERED that the petition for writ of habeas corpus is DENIED and DISMISSED without prejudice for failure to exhaust state court remedies. The petitioner's objections to Magistrate Naython's Report and Recommendation are also DENIED. It is further ORDERED that petitioner's motion for this Court to provide him with a complete copy of the state court trial transcripts in *Commonwealth v. Peoples* is DENIED. There is no probable cause for appeal.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1247

PEOPLES, MICHAEL,

Appellant

v.

FULCOMER, THOMAS, SUPERINTENDENT; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 86-4458

Argued December 7, 1987

Before: GREENBERG, SCIRICA, and HUNTER,
Circuit Judges

Opinion filed December 30, 1987

ROBERT E. WELSH, JR. (Argued)
DOUGLAS A. STUART
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Attorneys for Appellant

ELIZABETH J. CHAMBERS (Argued)
Assistant District Attorney
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
RONALD D. CASTILLE
District Attorney
1421 Arch Street
Philadelphia, PA 19102
Attorneys for Appellees

OPINION OF THE COURT

PER CURIAM:

1. Appellant Michael Peoples seeks a writ of habeas corpus. The District Court, adopting the report and recommendation of a U. S. Magistrate, dismissed his petition on the grounds that Peoples had not exhausted his state court remedies.

I. BACKGROUND

2. Following a jury trial in the Philadelphia Court of Common Pleas in 1981, Peoples was convicted of arson, endangering persons, aggravated assault and robbery. His post-verdict motions for a new trial were denied, and the conviction was affirmed by the Pennsylvania Superior Court in September, 1983. The following month, Peoples filed in the Pennsylvania Supreme Court a pro se "Petition for Allowance to File Appeal to Review Errors of the Superior court with Appointment of New Counsel" ("pro se petition"). The Supreme Court granted the request for appointment of counsel "to assist [Peoples] in filing a Petition for Allowance of Appeal," but did not discuss the merits of the claims raised in the pro se petition. Appendix at 170a. People's new counsel filed a Petition for Allowance of Appeal ("counseled petition") in June, 1985. The counseled petition was denied without opinion on November 4, 1985.

3. Prior to the denial of allocatur in 1985, Peoples had filed two petitions for writ of habeas corpus in federal District Court, each of which was denied for failure to exhaust state remedies. Peoples filed the current petition

for habeas corpus on July 28, 1986. The matter was referred to Magistrate Naythons, and the Philadelphia District Attorney filed a response contending that Peoples had not exhausted his state remedies. In his pro se reply to the response, Peoples directed the court's attention to his pro se petition for allocatur, and argued that that petition, considered with other relevant documents, showed he had satisfied the exhaustion requirement.

4. The Magistrate's Report and Recommendation that the writ be denied was filed on April 2, 1987. The report, which made reference to the counseled petition for allocatur but did not mention the pro se petition, stated that Peoples had not exhausted state remedies. In particular, the Magistrate referred to several claims that were missing from the counseled petition for allocatur as the basis for finding a lack of exhaustion. The parties are in dispute as to whether these claims are sufficiently raised in the pro se petition which the Magistrate did not consider.

5. The District Court approved and adopted the Magistrate's report and recommendation and denied the writ on April 17, 1987, three days before People's deadline for filing objections to the report. Peoples timely filed his objections on April 20. The court filed a new order the following day which denied the objections to the Magistrate's report and again denied the petition for writ of habeas corpus. Peoples filed a petition for certificate of probable cause to appeal to this court on April 28, 1987. This court granted the request on June 3, 1987. We will now reverse based upon our recent decision in *Chaussard v. Fulcomer,* 816 F.2d 925 (3d Cir. 1987). In *Chaussard,* this court found that a prisoner had satisfied the exhaustion requirement by filing a pro se petition for allocatur in the Supreme Court.

II. DISCUSSION

6. Peoples raises two claims on appeal. He first claims that he has sufficiently exhausted state court remedies for purposes of the federal habeas corpus statute, 28 U.S.C. § 2254 (1982). Second, Peoples asserts that if he is found not to have exhausted his state court remedies, his failure should be excused because further resort to the state courts would be futile.

7. The second issue is easily disposed of. He bases this assertion on the fact that "the inordinate delay which would be required to exhaust those remedies would render those remedies inadequate." Appellant's brief at 38. While it is true that exhaustion is not required where the attempt would be futile, *see* 28 U.S.C. § 2254(b), there is simply no basis for this court to rule as a matter of law that the state courts of Pennsylvania are unable to afford adequate relief because of inordinate delay.

8. Turning to the question of whether all the claims are exhausted, we first note that in this case our review is plenary, *Chaussard,* 816 F.2d at 927. In his current petition for habeas, Peoples asserts that he was denied due process under several theories, each of which has a slightly different procedural history in the state courts:

1. The prosecutor questioned the defendant on unrelated crimes.
2. Defendant's denial for a non-jury trial was denied.
3. Identification procedures were unnecessarily suggestive.

4. Peoples had ineffective assistance of counsel, in that counsel failed to:

   a. file motions to suppress evidence obtained through an illegal arrest, search and seizure; and

   b. object to the admission of unrelated crimes.

Each of these claims must be exhausted in order for the petition to satisfy the requirements of 28 U.S.C. § 2254(b). *See Rose v. Lundy,* 455 U.S. 509 (1982); *Chaussard,* 816 F.2d at 927. The question of whether each has been exhausted is therefore discussed individually below. Before turning to the individual claims, however, there is a preliminary question as to whether the pro se allocatur petition should be included in the procedural history of any claim.

A. The Pro Se Allocatur Petition.

9. A petition for allocatur to the state Supreme Court can suffice to satisfy the exhaustion requirement. *Chaussard, supra.* In this case, as in *Chaussard,* there were two different allocatur petitions: the pro se petition and the counseled one. The difference between this case and *Chaussard* is that, unlike the latter case, the pro se petition in this case was captioned "Petition for Allowance to File Appeal to Review Errors of Superior Court with Appointment of Counsel." *See* Appendix at 132a-40a. Appellees argue that this petition should not be considered for purposes of exhaustion because it was a request for counsel rather than for relief; as such, it did not give the Supreme Court a fair opportunity to review the substantive claims. Appellees' brief at 10-11.

10. The proper characterization of the pro se petition is a close question on which there seems to be no con-

trolling law. However, it seems that the Supreme Court had just as much discretion to review the merits of the petition here as it did in the *Chaussard* case. To begin with, the petition looks much more like a request for allocatur than a request for counsel: with the exception of the tail-end of the caption and part of the final sentence, the petition is concerned entirely with allocatur. In fact, the relief requested in the petition is for *both* the grant of allocatur and the appointment of counsel. Appendix at 138a. Thus, the closest procedural analogy to the Supreme Court's disposition of the petition would be a dismissal without prejudice: Peoples was granted an order for the appointment of counsel, but was told that his request for allocatur must be refiled within thirty days. While this might have been the most prudential course for the Supreme Court, it was within their discretion to grant relief on the merits. That they chose not to exercise that discretion should not keep Peoples out of federal court.

11. Admittedly, this argument may not fit in very well with the principle of comity which is at the heart of the exhaustion requirement. The Pennsylvania Supreme Court exercised its discretion in such a way as to avoid deciding an issue before it was presented by counsel; once a counseled petition had been filed, it would have been improper to consider the claims raised in the pro se petition but not the counseled one. And yet those choices seem sufficient to allow a federal court to hear the merits of People's petition. It may be argued that this result is inconsistent with the principle of comity, but the course charted out by *Chaussard* compels our decision here. This court's prior decision in *Chaussard* makes it impossible for us now to ignore the pro se allocatur petition in this case.

B. Exhaustion of Specific Claims.

1. Improper Cross Examination.

12. This claim was raised in the post-trial motions, in the brief before the Superior Court, and in the pro se petition for allocatur; it was not raised in the counseled petition. Given our holding that the pro se petition is properly considered part of the procedural history of this claim, the exhaustion requirement is satisfied.

2. Denial of Non-Jury Trial.

13. This claim was raised in the post-trial motions, but not in the brief before the Superior Court. The claim was resurrected in the pro se petition for allocatur but then left out of the counseled claim. Assuming again that the pro se petition is relevant, the exhaustion requirement may be deemed satisfied under *Chaussard.* Since the Supreme Court gave no indication that it would refuse to hear the non-jury trial claim because of the procedural defect of not raising it before the Superior Court, *Chaussard* would suggest that inclusion of the claim in the petition for allocatur is sufficient. *See Klein v. Harris,* 667 F.2d 274, 284-85 (2d Cir. 1981).

3. Tainted Identification Procedures.

14. This had essentially the same procedural history as the first claim about the improper cross-examination, and should be considered exhausted for the same reasons.

4. Ineffective Assistance of Counsel.

15. Peoples raised two ineffectiveness claims in his habeas petition. The first stated that he had been denied

effective assistance because his attorney had failed to seek suppression of the fruits of the arrest. Appellant's brief to this court asserts that this claim was made for the first time "in terms of the ineffective assistance of appellate counsel in the counselled Petition" Appellant's brief at 37 (citing Appendix at 41a-42a). This would not support a finding of exhaustion, since a claim that trial counsel was ineffective is not the same as a claim that appellate counsel failed to assert viable theory on appeal. However, a fair reading of the pro se allocatur petition, Appendix at 136a-37a, shows that Peoples did raise the ineffective ss of *trial* counsel in that document. Thus under the reasoning set out above, this claim has been exhausted.

16. The second ineffectiveness claim, that counsel failed to object to admission of unrelated crimes, was raised only in the pro se petition; it was not mentioned in the post-trial motions, the brief before the Superior Court, or the counseled petition. Thus, like all the other claims, the issue of exhaustion turns on whether the pro se petition is a relevant document; since we hold that it is, this claim has been exhausted.

CONCLUSION

17. Because we find that appellant Peoples has satisfied the exhaustion requirement of 28 U.S.C. § 2254, we will reverse the decision of the District Court and remand for a hearing on the merits of the habeas petition.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1247

PEOPLES, MICHAEL,
Appellant

v.

FULCOMER, THOMAS, SUPERINTENDENT; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

D.C. Civ. No. 86-4458

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, and HUNTER, *Circuit Judges.*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Morton I. Greenberg
Circuit Judge

Dated: Jan 25, 1988.